86-1024

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONFERENCE OF STATE BANK SUPERVISORS,
FLORIDA DEPARTMENT OF BANKING AND FINANCE,
FLORIDA BANKERS ASSOCIATION and
SUN BANK/PALM BEACH,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
and U.S. TRUST CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 3(d) of the Bank Holding Company Act—popularly known as the "Douglas Amendment"—whose clear purpose, as enacted in 1956 and as amended in 1966, was to prevent bank holding companies from acquiring deposit-taking banks across state lines without state authorization, no longer applies to interstate acquisitions of deposit-taking banks that do not make commercial loans, because of a 1970 amendment that changed the definition of "bank" in Section 2(c) of the Act to exclude institutions not engaged in the business of making commercial loans.

2. Whether the court below failed to follow clearly applicable decisions of this Court with respect to the construction of amending statutes when it concluded that the amended definition of "bank" in Section 2(c) of the Act, as interpreted by this Court in *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986), must be applied automatically to the term "additional bank" in Section 3(d), the Douglas Amendment, even though the court below found that such application would defeat the clearly defined congressional purpose embodied in the Douglas Amendment.

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Petitioners, Conference of State Bank Supervisors ("Conference"), Florida Department of Banking and Finance ("Department"), Florida Bankers Association ("Association") and Sun Bank/Palm Beach,[1] respectfully

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[1] The Conference is the professional organization of the state government officials responsible for regulating over 10,000 state-chartered banks in the 50 states and in Guam, Puerto Rico and the Virgin Islands. The Department is the Florida state agency responsible, *inter alia*, for regulating state-chartered banks in Florida. The Association is a membership association representing over 90

pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on October 6, 1986.

OPINIONS BELOW

The two opinions below of the Eleventh Circuit Court of Appeals are reported at 760 F.2d 1135 and 800 F.2d 1534, and appear in the Appendix ("App.") beginning at 10a and 46a, respectively. The order of the Federal Reserve Board is reported at 70 Fed. Res. Bull. 371 and appears at App. 1a.

JURISDICTION

The final judgment of the Court of Appeals was entered on October 6, 1986 (App. 46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Statutory Appendix, *infra*, pp. 20-21.

STATEMENT

This case arises out of an order of the Federal Reserve Board ("Board") which, for the first time since the enactment in 1956 of the Bank Holding Company Act, 12 U.S.C. §§ 1841-50 ("Act"), allowed a bank holding company to acquire a deposit-taking bank in another state without that state's specific statutory authorization pursuant to Section 3(d) of the Act, popularly known as the "Douglas Amendment."[2] The Board's order permitted

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percent of the commercial banks and bank holding companies headquartered in Florida. Sun Bank/Palm Beach is a state-chartered bank, headquartered in Palm Beach, Florida, which is a subsidiary of SunTrust Banks, Inc.

[2] The Douglas Amendment provides that a bank holding company may *not* acquire "any additional bank" located outside of the state in which the holding company's principal banking subsidiaries are

U.S. Trust Corporation ("U.S. Trust"), a registered New York bank holding company, to establish a subsidiary national bank, U.S. Trust Company of Florida, N.A. ("U.S. Trust-Florida"), in Palm Beach, Florida.[3] Petitioners challenged U.S. Trust's unprecedented application on the ground that U.S. Trust's acquisition of a deposit-taking national bank in Florida *without* Florida's specific authorization would violate the Douglas Amendment. In response, U.S. Trust argued that its acquisition was not subject to the Douglas Amendment because U.S. Trust-Florida would not make commercial loans and therefore would not fall within the literal definition of "bank" in Section 2(c) of the Act, as *amended* in 1970.[4]

The Board acknowledged that U.S. Trust's application presented a "serious potential for undermining the policies of the Act," because U.S. Trust's proposed acquisition, if repeated by other bank holding companies, would "defeat[]Congressional policies . . . with respect to limitations on interstate banking."[5] Nevertheless, the Board concluded that, since U.S. Trust-Florida would not make

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located *unless* such an acquisition is "specifically authorized by the statute laws of the State in which such bank is located." 12 U.S.C. § 1842(d).

[3] U.S. Trust had previously operated a state-chartered *nondeposit* trust company in Palm Beach. U.S. Trust received permission from the Comptroller of the Currency to convert this nondeposit trust company into a chartered national bank, and then obtained Board approval to expand the bank's activities to include (i) the acceptance of demand deposits and savings accounts, which would be insured by the Federal Deposit Insurance Corporation ("FDIC"), and (ii) the making of consumer loans. *See* 760 F.2d at 1137, App. 13a-14a; 70 Fed. Res. Bull. at 371-372, App. 1a-2a.

[4] Section 2(c) of the Act, as amended in 1970, defines "bank," in pertinent part, to include each institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." *See* Act of Dec. 31, 1970, Pub. L. No. 91-607, § 101(c), 84 Stat. 1761.

[5] 70 Fed. Res. Bull. at 372, 373, App. 3a, 6a.

commercial loans, the Board was "constrained by the definition of bank in [Section 2(c) of] the Act to approve the application." [6]

Petitioners sought review of the Board's order in the Eleventh Circuit Court of Appeals pursuant to 12 U.S.C. § 1848. In its initial decision, the Court of Appeals concluded that the Board's order would "destroy the important federal policy embodied in the Douglas Amendment." [7] The Court of Appeals found that this congressional policy—namely, "to prohibit the creation of interstate deposit-taking networks by bank holding companies without specific state authorization" (760 F.2d at 1141, App. 22a)—had been enacted in 1956 and reaffirmed in 1966, and had *not* been rescinded by the 1970 amendment to Section 2(c).[8] The Court of Appeals therefore reversed the Board's order.[9]

Following the Eleventh Circuit's initial decision, U.S. Trust petitioned this Court for a writ of certiorari. On January 27, 1986, this Court granted U.S. Trust's petition, vacated the Eleventh Circuit's initial decision, and remanded this case to the Court of Appeals "for further

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[6] 70 Fed. Res. Bull. at 372, App. 3a.

[7] 760 F.2d at 1143, App. 27a.

[8] The Court of Appeals could find no evidence of any "change in congressional intent" in 1970 with respect to the Douglas Amendment. The Court therefore held that it was unreasonable "to conclude that Congress intended in 1970 to destroy the Douglas Amendment by adopting an amendment to the definition of bank which would permit bank holding companies to establish an unlimited number of deposit-taking banks across state lines without state approval." 760 F.2d at 1141, App. 23a.

[9] The Court of Appeals held that the Board should have denied U.S. Trust's application pursuant to its authority to "prevent evasions" of the Act under Section 5(b) thereof, 12 U.S.C. § 1844(b). In this regard, the Court held that U.S. Trust's application was "a violation of the Douglas Amendment" and an "evasion . . . of the fundamental purposes of the Act." 760 F.2d at 1143, App. 26a-28a.

consideration in light of *Board of Governors v. Dimension Financial Corp.*," 106 S. Ct. 681 (1986), App. 30a ("*Dimension*").[10]

In *Dimension* this Court had struck down a regulation of the Board which adopted a broader definition of "bank," for purposes of the entire Act, than the explicit statutory definition contained in Section 2(c), as amended in 1970. The Board's regulation enlarged the statutory definition of "bank" by adopting new definitions of "demand deposits" and "commercial loans." This Court held that the Board's regulation was contrary to the plain language and legislative history of Section 2(c), and could not be justified by the Board's self-created policy of regulating all institutions that were "functionally equivalent" to banks. This Court, however, did *not* consider the Douglas Amendment in *Dimension*, nor did it address the issue of whether bank holding companies which already owned "banks" as defined in Section 2(c) could proceed to acquire additional deposit-taking banks across state lines without regard to the Douglas Amendment.

On remand, the Eleventh Circuit reiterated its original conclusions as to (i) the scope and purpose of the Douglas Amendment, and (ii) the lack of any evidence that Congress intended, by its amendment of the definition of "bank" in 1970, to authorize bank holding companies to make interstate acquisitions of deposit-taking banks without state authorization.[11] Nevertheless, the Eleventh Circuit held that this Court's decision in *Dimension* required affirmance of the Board's order. The Eleventh Circuit concluded that the definition of "bank" in Section *2(c)*, as interpreted by this Court in *Dimension*, must be automatically applied to the term "additional bank" in Section *3(d)*, the Douglas Amendment, even though the result

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[10] *U.S. Trust Corp. v. Board of Governors*, 106 S. Ct. 875, 876 (1986), App. 45a.

[11] 800 F.2d at 1535-36 and n.2, App. 48a-49a.

"clearly frustrates the congressional purpose expressed in the Douglas Amendment." [12] Thus, the sole basis for the Eleventh Circuit's final judgment was its holding that the same definition of "bank" must be applied in both Section 2(c) and Section 3(d) regardless of the actual intent of Congress.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Contrary to the Explicit Mandate of Congress in the Douglas Amendment, and It Involves a Question of Great Importance to the Regulation of Banking in the United States.

This case involves an issue, of first impression in this Court, which is of great significance to the U.S. banking industry. It involves an important area of federal-state relations, namely, the authority of each state under the Douglas Amendment to regulate the interstate expansion of bank holding companies. The question is whether the Federal Reserve Board may permit regulated bank holding companies to acquire deposit-taking banks across state lines *without* specific state authorization, as long as such banks do not make commercial loans.

Petitioners contend, and the Board and the Court of Appeals have acknowledged,[13] that the Board's action in this case is contrary to the long-established congressional purpose embodied in the Douglas Amendment. This Court recognized in *Northeast Bancorp, Inc. v. Board of Governors*, 105 S. Ct. 2545 (1985) (*"Northeast Bancorp"*), that the Douglas Amendment provides broad authority to each state to regulate the degree to which banks may be acquired within its borders by out-of-state bank holding companies.[14] In view of the broad authority

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[12] 800 F.2d at 1537, App. 51a.

[13] 70 Fed. Res. Bull. at 372-73, App. 3a-6a; 760 F.2d at 1141-43, App. 22a-27a.

[14] As noted by this Court, Senator Douglas described his Amendment as a provision which would allow bank holding companies to

granted to the states by the Douglas Amendment, this Court held that states could "partially lift the ban on interstate banking without opening themselves up to interstate banking from everywhere in the Nation." 105 S. Ct. at 2553.

The Board's U.S. Trust order, however, for the first time since the Act was passed in 1956, has permitted a bank holding company to acquire a deposit-taking bank across state lines *without* state authorization, if that bank refrains from making commercial loans. Not surprisingly, the Board's order triggered an "avalanche" of similar applications by bank holding companies to establish more than 200 deposit-taking banks across state lines.[15] Although the Board temporarily suspended processing of these applications on March 15, 1985,[16] the General Counsel of the Board recently stated that the Board will soon begin deciding these applications in view of the decision below by the Eleventh Circuit.[17]

The great majority of the foregoing applications have been filed by bank holding companies which seek to evade the limitations on interstate expansion that have been imposed by regional interstate statutes adopted by Florida, 26 other states and the District of Columbia.[18] These

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acquire banks in other states "*only to the degree* that State laws expressly permit them." 102 Cong. Rec. 6858 (1956) (emphasis added), *quoted in Northeast Bancorp*, 105 S. Ct. at 2552.

[15] 760 F.2d at 1138, App. 16a; "Banks Rush to Stake Out Interstate Claims," Am. Banker, April 30, 1984, at 1, 7-9.

[16] *Suspension of Processing of Applications to Acquire Nonbank Banks*, 71 Fed. Res. Bull. 323 (1985).

[17] 47 Wash. Fin. Rep. 702 (Nov. 3, 1986).

[18] For a list of states enacting regional laws, *see* CCH Fed. Bank. L. Rep. ¶ 3106, and 47 Wash. Fin. Rep. 352-53 (Sept. 9, 1986).

regional statutes allow entry *only* by those out-of-state bank holding companies that are located within a defined geographic region.[19] In *Northeast Bancorp*, 105 S. Ct. at 2553, this Court upheld such statutes on the ground that the Douglas Amendment authorizes any state to pursue a limited, regional banking approach that "allow[s] expansion and growth of local banks without opening [its] borders to unimpeded interstate banking."

However, the decision below will speedily and irretrievably undermine State regional banking statutes, because it permits all out-of-state bank holding companies from every region to acquire deposit-taking banks in the relevant states. Thus, in contravention of the clear mandate of the Douglas Amendment as interpreted in *Northeast Bancorp*, the decision below has opened up Florida and other states to "unimpeded interstate banking" without their consent.[20] The result will be to render *Northeast Bancorp* a hollow victory for the states.

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[19] For example, Fla. Stat. Ann. § 658.295 (1984) provides that an out-of-state bank holding company may acquire a Florida bank whose deposits are insured by the FDIC only if the principal place of business of the holding company and more than 80 percent of the total deposits held by its bank subsidiaries are located within a defined "Region" consisting of 12 Southeastern states and the District of Columbia. New York is not included within the defined "Region." Thus, Section 658.295 affirmatively *prohibits* New York bank holding companies, such as U.S. Trust, from acquiring FDIC-insured, deposit-taking Florida banks such as U.S. Trust-Florida.

[20] Regulated bank holding companies are already permitted under 12 C.F.R. § 225.25(b)(1) to engage in commercial lending activities on a nationwide scale through nonbanking subsidiaries. Accordingly, if bank holding companies are permitted to establish deposit-taking banks in every state pursuant to the decision below, such companies will be able, as a practical matter, to establish a nationwide full-service banking business without regard to the Douglas Amendment and state law.

II. The Decision Below Ignored Clearly Applicable Decisions of this Court with Respect to the Construction of Amending Statutes, and It Misconstrued this Court's Decision in *Dimension*.

A. The Court Below Erred in Holding that the Term "Additional Bank" in the Douglas Amendment Must Be Given Exactly the Same Meaning as the Term "Bank" in Section 2(c).

The Court of Appeals' final decision was based solely upon its holding that the definition of "bank" in *Section 2(c)*, as construed by this Court in *Dimension*, must be automatically applied to the term "additional bank" in *Section 3(d)*, the Douglas Amendment.[21] This holding is contrary to a series of cases in which this Court has held that a word *can* have different meanings in different sections of a single statute, even if the word has been expressly defined in one section. In *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932), this Court declared that the

> natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . *is not rigid and readily yields* whenever there is such a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. . . .
>
> It is not unusual for the same word to be used with different meanings in the same act, and *there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance.*[22]

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[21] The Court of Appeals, invoking an "elementary precept of statutory construction," stated that the definition of "bank" in Section 2(c) "controls the construction of the term wherever it appears throughout the statute." 800 F.2d at 1536, App. 51a.

[22] 286 U.S. at 433 (citations omitted; emphasis added). *Accord, Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87-88 (1934)

Atlantic Cleaners held that the term "trade or commerce" had a *different* and broader meaning for purposes of Section 3 of the Sherman Antitrust Act than the same term had for purposes of Section 1 of that Act. Similarly, in *Cass v. United States*, 417 U.S. 72 (1974), this Court held that a proviso in 10 U.S.C. § 687(a)(2), which expressly defined "a part of a year that is six months or more . . . as a whole year," was intended to apply in calculating the "years of active service" of a former Armed Forces reservist in determining the amount of his readjustment pay, but was *not* intended to apply to the requirement that a reservist must have completed "at least five years of continuous active duty" before he could collect any readjustment pay. In view of the statute's clear purpose to require *five full years* of active duty for eligibility, this Court refused to apply the statutory definition in a manner that would reduce the eligibility requirement to four and one-half years.[23]

The flexible and realistic approach of this Court toward statutory construction in *Atlantic Cleaners* and *Cass* is consistent with this Court's oft-repeated admonition that a statutory definition should not be applied "mechanically"

(holding that the term "obligations" had different meanings in Sections 213(b)(4) and 217(a) of the Revenue Act of 1926); *Farmers Reservoir & Irrigation Co. v. Macomb*, 337 U.S. 755, 764-66 (1949) (holding that the word "production" in Section 3(f) of the Fair Labor Standards Act had a meaning which was different from the definition of "production" contained in Section 3(j) of the same Act); *District of Columbia v. Carter*, 409 U.S. 418, 420-21 (1973) (holding that the District of Columbia is not a "State or Territory" within 42 U.S.C. § 1983, even though it is a "State and Territory" within 42 U.S.C. § 1982).

[23] In deciding to follow the manifest congressional purpose of the eligibility requirement in 10 U.S.C. § 687(a), instead of the definitional proviso, this Court said: "In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." 417 U.S. at 83, *quoting Schmid v. United States*, 193 Ct. Cl. 780, 789, 436 F.2d 987, 992 (Nichols, J., dissenting), *cert. denied*, 404 U.S. 951 (1971).

in a manner which would "defeat the purpose of the legislation." [24] As recognized by the Court of Appeals itself, a literal insertion of the Section 2(c) definition of "bank" into the term "additional bank" in Section 3(d) "clearly frustrates the congressional purpose expressed in the Douglas Amendment." [25] Moreover, in cases such as this one, where the statutory definition of "bank" was amended in 1970 in a way that appeared to be inconsistent with the purpose of the Douglas Amendment but without any indication of a congressional intent to rescind that purpose, this Court has refused to hold that the statutory purpose has been ousted by the subsequent amendment to the definition.[26]

B. This Court Did Not Decide the Douglas Amendment Issue in *Dimension*.

This Court did not address or decide in *Dimension* the issue, presented in this case, of whether the Douglas Amendment continues to apply to *interstate* acquisitions

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[24] *Philko Aviation, Inc. v. Shacket*, 462 U.S. 406, 412 (1983) (refusing to interpret literal definition of "conveyance" under the Federal Aviation Act in a manner that would conflict with the clear purpose of the Act to require the recordation of every aircraft transfer). *Accord, Farmers Reservoir & Irrigation Co., supra* note 22, 337 U.S. at 764; *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949) (refusing to apply technical definitions of "disability" and "injury" under the Longshoremen's and Harbor Workers' Compensation Act in a manner that would impose a liability on employers that was not intended by Congress).

[25] 800 F.2d at 1537, App. 51a. *See also* pages 14-19, *infra*.

[26] *Cass v. United States*, 417 U.S. at 79-83 (holding that the original purpose of Congress to require five full years for eligibility under 10 U.S.C. § 687(a) had *not* been changed by a subsequent amendment to the definition of "year"); *FDIC v. Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986) (following original purpose of the Federal Deposit Insurance Act of 1933 instead of the literal terms of the 1960 amendment to the definition of "deposit" in that Act). *See also Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974).

by *regulated* bank holding companies of deposit-taking banks that do not make commercial loans.[27] This Court did not consider in *Dimension* whether the 1970 amendment to Section 2(c) of the Act was intended by Congress to remove the prior authority of each state to determine the extent to which deposit-taking banks could be acquired within its borders by out-of-state bank holding companies, even if such banks did not make commercial loans. Indeed, the decision of the Tenth Circuit Court of Appeals in *Dimension*, which this Court affirmed, expressly *declined* to consider the Douglas Amendment question, although the Tenth Circuit did acknowledge that the Douglas Amendment "is a significant factor in the mix of state and federal regulation." 744 F.2d at 1410.

C. This Court's Interpretation of Section 2(c) in *Dimension* Is Compatible with Petitioners' Construction of the Douglas Amendment.

This Court's interpretation in *Dimension* of the definition of "bank" in Section 2(c) does not conflict with Petitioners' suggested construction of the term "additional bank" in the Douglas Amendment. In *Dimension*, this Court struck down a regulation of the Board which sought to expand the statutory definition of "bank" for all purposes of the Act and, thereby, to extend the Board's basic jurisdiction under the Act.[28] The Board's

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[27] In *Dimension*, 106 S. Ct. at 685, App. 35a, this Court did note that the Board had referred in its regulation defining "bank" to "the statutory proscription on interstate banking without prior state approval." However, this Court did not refer to the Douglas Amendment by name, nor did it discuss the legal effect or purpose of that statute.

[28] The definition of "bank" in Section 2(c) determines the general jurisdiction of the Board under the Act. Sections 2(a)(1) and 3(a)(1) of the Act provide that (i) a company must obtain the Board's prior approval in order to acquire "control" of a "bank,"

primary objective in adopting its regulation was to bring *nonbanking* companies, which were *not* otherwise subject to regulation as bank holding companies, *within* the scope of the Act if they acquired institutions that were "the functional equivalent of banks." *See* 106 S. Ct. at 685 and n. 3, App. 35a. The Board urged that its regulation was supported by the "plain purpose" of the Act, but this Court held that Congress had never adopted such a far-reaching policy. *Id.* at 688-89, App. 42a-44a.

In contrast to the sweeping terms of the Board's regulation in *Dimension*, Petitioners seek only to ensure that *regulated bank holding companies*, such as U.S. Trust, which *already* own at least one "bank" as defined in Section 2(c), will not be able to acquire *additional* deposit-taking banks across state lines *unless* they comply with the Douglas Amendment. Therefore, unlike the Board's regulation in *Dimension*, Petitioners' construction of the Douglas Amendment does *not* seek to expand the Board's jurisdiction to embrace holding companies which are not already regulated by the Act.[29] Petitioners' construction of the Douglas Amendment thus does not conflict with this Court's holding in *Dimension* that the Act regulates only those holding companies which control at least one Section 2(c) bank.

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and (ii) upon such acquisition, that company will become a "bank holding company" subject to regulation by the Board under the Act. *See* 12 U.S.C. §§ 1841(a)(1) and 1842(a)(1). For example, a bank holding company is required to "register" with the Board and to file periodic reports under 12 C.F.R. § 225.5, and it must comply with the Board's regulations in acquiring additional subsidiary banks or nonbanking subsidiaries. *See* 12 U.S.C. §§ 1842 and 1843, and 12 C.F.R. §§ 225.11-225.25.

[29] U.S. Trust owns a "bank," as defined in Section 2(c), which accepts demand deposits, makes commercial loans and is located in New York. 760 F.2d at 1137, App. 14a. Accordingly, U.S. Trust is already subject to the Board's jurisdiction under the Act.

D. There Is No Indication that Congress Intended, by Amending the Definition of "Bank" in 1970, to Emasculate the Long-standing Control of the States Over Interstate Acquisitions of Deposit-Taking Banks.

The Court of Appeals properly concluded in its initial decision that the Douglas Amendment, as enacted in 1956 and amended in 1966, was intended "to prohibit the creation of interstate deposit-taking networks by bank holding companies without specific state authorization." 760 F.2d at 1141, App. 22a. The Court of Appeals also correctly found, in both of its opinions, that there is no evidence to indicate that Congress intended to repeal or "emasculat[e]" the Douglas Amendment when it revised the definition of "bank" (but *not* the Douglas Amendment) in 1970.[30] Accordingly, in view of the decisions of this Court in the similar cases discussed above,[31] the Court of Appeals in its final judgment should have reaffirmed its initial holding that the 1970 amendment to Section 2(c) did not rescind the Douglas Amendment's bar against interstate acquisitions of deposit-taking banks.

1. *The 1956 Act*

The Douglas Amendment was added on the floor of the Senate to the original Bank Holding Company Act of 1956. *Northeast Bancorp*, 105 S. Ct. at 2551. Senator Douglas declared that his Amendment was intended to

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[30] 800 F.2d at 1535-36 and n.2, App. 48a-49a ("Nowhere in the legislative history of the Act's changing definition of 'bank' is there the slightest hint that Congress considered the effect of the amendments on the Douglas Amendment, nor is there a hint that Congress conceived that a bank holding company could gain an interstate bank charter without state approval.") *See also* 760 F.2d at 1140-42, App. 23a-25a (unreasonable to conclude that the 1970 amendment to Section 2(c) was intended to cause "a total emasculation of the long held policy giving states control over bank expansion").

[31] *See* notes 22-26, *supra*, and accompanying text.

"prevent an undue concentration of banking and financial power" by prohibiting bank holding companies from continuing to acquire deposit-taking banks across state lines, "unless the States give them explicit permission to do so." 102 Cong. Rec. 6857-59 (1956).

In this regard, Senator Douglas drew a close analogy between his Amendment and the McFadden Act, 12 U.S.C. § 36. Under the McFadden Act, national banks may establish branches only *within* their home state and only to the degree permitted to state banks under state law. *E.g.*, *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). The Douglas Amendment was specifically intended to prevent bank holding companies from continuing to evade the McFadden Act's prohibition against interstate branching through the device of establishing separate bank subsidiaries in different states. 102 Cong. Rec. 6858 (1956).[32]

Under the McFadden Act, the *acceptance of deposits* through a remote facility is sufficient *without more* to constitute "branching."[33] Thus, U.S. Trust would have been barred under the McFadden Act from establishing a national bank in New York with a deposit-taking branch in Florida. In view of the purpose of the Douglas Amendment to prevent evasions of the McFadden Act, the Douglas Amendment clearly prohibited U.S. Trust,

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[32] See *Northeast Bancorp*, 105 S. Ct. at 2552-53. Indeed, Senator Douglas declared that his Amendment was "a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy." 102 Cong. Rec. 6860 (1956).

[33] The McFadden Act defines "branch" to include "any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). The exercise of *any one* of the three enumerated functions at a remote facility will make that facility a "branch." *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 134-35 (1969).

whose principal subsidiary bank is in New York, from establishing an additional deposit-taking subsidiary bank in Florida.

The definition of "bank" in Section 2(c) of the original 1956 Act included all chartered banks.[34] Therefore, under the literal terms of the 1956 Act, the Douglas Amendment was plainly intended to apply to every interstate acquisition of a deposit-taking bank by a bank holding company. The Douglas Amendment's ban on interstate acquisitions of deposit-taking banks, absent state approval, reflected Congress' long-standing concern that banking, and especially the taking of deposits, should be subject to "local, community-based control." *Northeast Bancorp*, 105 S. Ct. at 2553.[35]

2. *The 1966 Amendments*

In 1966, Congress specifically acted to strengthen the Douglas Amendment. First, Congress removed an unintended loophole from the Douglas Amendment by precluding the possibility that a bank holding company could establish its principal office in one state and its principal

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[34] The original 1956 definition of "bank" included "any national banking association or any State bank, savings bank or trust company." Act of May 9, 1956, ch. 240, § 2(c), 70 Stat. 133.

[35] Senator Douglas and his supporters (as well as those in the House of Representatives who passed an earlier bill completely banning interstate bank acquisitions but accepted the Douglas compromise) concluded that state control over the acquisition of deposit-taking banks was necessary to ensure a decentralized banking system which would avoid an undue concentration of control over credit and would be responsive to local consumer and business needs. *See* 102 Cong. Rec. 6857-59 (1956) (remarks of Sen. Douglas); *id.* at 6862 (statement by Sen. Payne and remarks of Sen. Morse); H.R Rep. No. 609, 84th Cong., 1st Sess. 2, 6, 14-15 (1955); 101 Cong. Rec. 3822-24 (1955) (remarks of Rep. Spence, chairman of the House Banking and Currency Committee, quoting a speech by Speaker of the House Rayburn); *id.* at 8028-31, 8033-34 (remarks of Representatives Patman, Rains and Marshall); 102 Cong. Rec. 7165 (1956) (remarks of Rep. Spence, endorsing the Douglas Amendment).

bank subsidiaries in another state and then claim that it had *two* "home states" in which it could acquire deposit-taking banks without state authorization.[36]

Second, Congress repealed the 1956 Act's exemption for regulated investment companies,[37] thereby prohibiting any further interstate expansion by Financial General Corp., an investment company which controlled 21 banks in five states and the District of Columbia.[38] Finally, Congress amended the definition of "bank" in Section 2(c) by adopting an explicit *deposit-based* test. Under the 1966 amendment, the term "bank" included "any institution that accepts deposits that the depositor has a legal right to withdraw on demand. . . ." [39] This amendment confirmed that all banks accepting demand deposits would be subject to the Douglas Amendment.

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[36] The 1966 amendment to Section 3(d) of the Act (i) confirmed that the "home state" of each bank holding company would be the state in which its "principal operations" were conducted (*i.e.*, the state in which the total deposits of its bank subsidiaries were the largest), and (ii) deleted the previous *alternative* designation of "home state" as the state in which the holding company's principal place of business was located. Act of July 1, 1966, Pub. L. No. 89-485, § 7(d), 80 Stat. 237. *See* S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385 at 2393 (intent of amendment is to "restrict[] expansion [of bank holding companies] to State in which principal operations are conducted").

[37] Act of July 1, 1966, *supra* note 36, §§ 1 and 2, 80 Stat. 236.

[38] S. Rep. No. 1179, *supra* note 36, 1966 U.S. Code Cong. & Ad. News at 2389, 2390.

[39] Act of July 1, 1966, *supra* note 36, § 3, 80 Stat. 236.

The report of the Senate Banking Committee stated that the acceptance of "deposits payable on demand (checking accounts), [is] the commonly accepted test of whether an institution is a commercial bank." S. Rep. No. 1179, *supra* note 36, 1966 U.S. Code Cong. & Ad. News at 2391 (emphasis added), *quoted in Dimension*, 106 S. Ct. at 685 n.2, App. 34a.

3. *The 1970 Amendment to Section 2(c)*

As the Court of Appeals concluded, there is no evidence to suggest that Congress intended the Douglas Amendment to be affected in any way by the 1970 amendment to Section 2(c).[40] The 1970 amendment, which retained the demand deposit test while adding the reference to commercial lending,[41] was introduced in the Senate prior to the Senate committee hearings on the 1970 bills to amend the Act.[42] The only information concerning the amendment that Congress received during the Senate hearings was that the amendment would have "very limited application at present, possibly affecting only one institution." [43] No reference was made during the hearings or the debates concerning any impact of the amendment to Section 2(c) upon the Douglas Amendment.

The Senate committee report on the 1970 amendments to the Act, upon which this Court relied heavily in *Dimension*, stated that the amendment to Section 2(c) would "exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank.'" [44] However, the Senate report did not mention the Douglas Amendment, and it gave no indication that regulated bank holding companies, such as U.S. Trust, that *already* owned dual-purpose banks, could proceed to

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[40] 760 F.2d at 1140-42, App. 19a-24a; 800 F.2d at 1535-36 and n.2, App. 48a-49a.

[41] *See* note 4, *supra*.

[42] 116 Cong. Rec. 14818-21 (1970) (remarks of Sen. Brooke of Massachusetts).

[43] *One-Bank Holding Company Legislation of 1970: Hearings on S. 1052, et al., before the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. 137 (1970) (letter of Gov. J. L. Robertson of the Board to Sen. Sparkman, chairman of the Senate committee).

[44] S. Rep. No. 1084, 91st Cong., 2d Sess. 24 (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 5519 at 5541, *quoted in Dimension*, 106 S. Ct. at 687-88, App. 40a-41a.

acquire *additional* deposit-taking banks across state lines without regard to the Douglas Amendment.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the final judgment of the Eleventh Circuit Court of Appeals in this case.

Respectfully submitted,

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December, 1986

STATUTORY APPENDIX

Section 2(a)(1) of the Bank Holding Company Act, 12 U.S.C. § 1841(a)(1), provides in pertinent part:

> "[B]ank holding company" means any company which has control over any bank or over any company that is or becomes a bank holding company by virtue of this [Act].

Section 2(c) of the Act, 12 U.S.C. § 1841(c), including the 1970 amendment thereto, provides in pertinent part:

> "Bank" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, or any territory of the United States . . . , except an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or an institution chartered by the Federal Home Loan Bank Board, which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. . . .

Section 3(a) of the Act, 12 U.S.C. § 1842(a), provides in pertinent part:

> It shall be unlawful except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any

bank holding company to merge or consolidate with any other bank holding company. . . .

Section 3(d) of the Act, 12 U.S.C. § 1842(d), provides in pertinent part:

> Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under Section 1823 (f) of this title) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. . . .

86-1024

No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CONFERENCE OF STATE BANK SUPERVISORS,
FLORIDA DEPARTMENT OF BANKING AND FINANCE,
FLORIDA BANKERS ASSOCIATION and
SUN BANK/PALM BEACH,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
and U.S. TRUST CORPORATION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX

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APPENDIX

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

U.S. Trust Corporation
New York, New York

Order Approving Expansion of Activities of Trust Company to Include Checking Accounts and Consumer Lending

U.S. Trust Corporation, New York, New York, a bank holding company within the meaning of the Bank Holding Company Act (12 U.S.C. § 1841 et seq.) ("Act"), has applied for approval under section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)) and section 225.23(a)(1) of the Board's Regulation Y (12 CFR § 225.23(a)(1)) to expand the activities of its subsidiary, U.S. Trust Company, Palm Beach, Florida ("Trust Company"), to include the acceptance of time and demand deposits, including checking accounts, and the making of consumer loans. These activities have been previously determined by the Board to be closely related to banking. 12 CFR § 225.25(b)(1); *First Bancorporation* (Beehive Thrift & Loan), 68 FEDERAL RESERVE BULLETIN 253 (1982); *Citizens Fidelity Corporation*, 69 FEDERAL RESERVE BULLETIN 556 (1983).

Notice of the application, affording opportunity for interested persons to comment, has been duly published (48 *Federal Register* 55178 (1983)). The time for filing comments and views has expired and the Board has considered the application and all comments received, including those submitted by the State of Florida, the Florida Bankers Association, the Conference of State Bank Supervisors, and Sun Bank/Palm Beach ("Protestants") in opposition to the proposal, in light of the factors set forth in section 4(c)(8) of the Act (12 U.S.C. § 1843(c)(8)).

Applicant is the 19th largest commercial banking organization in New York, with total consolidated assets of $1.8 billion. Applicant operates one subsidiary bank with total deposits of $1.2 billion.[1]

Trust Company at present is a state chartered nondepository trust company that engages in the provision of fiduciary, investment advisory, agency, and custody services for local customers in Florida. Applicant has stated that Trust Company will convert to a national bank charter prior to engaging in the proposed activities and will obtain FDIC insurance for its deposits. Trust Company proposes to offer a number of different types of deposit accounts to the general public, including checking accounts with a minimum deposit of $10,000. Trust Company also will offer loans to individuals for personal, family, household, or charitable purposes.

Applicant has stated that Trust Company will not engage in the business of making commercial loans, including the purchase of commercial paper or certificates of deposit, the sale of federal funds, or any transactions that the Board has defined as commercial loans in its recent revisions to Regulation Y. Applicant states that Trust Company's excess funds will be invested in investment securities permitted for national banks under 12 U.S.C. section 24 (seventh). Applicant does not currently engage in any commercial lending activities or operate any other subsidiaries in Florida and has stated that it will seek the Board's prior approval before engaging in any commercial lending activities in Florida. Moreover, Applicant has stated that trust company will not channel funds to any commercial lending affiliate or engage in any transactions with affiliates without the Board's approval. Accordingly, it appears that Trust Company will

[1] Deposit data are as of September 30, 1983.

not engage in the business of making commercial loans either directly or indirectly.

"Bank" Definition

This proposal raises a significant issue as to whether acceptance of demand deposits through an FDIC insured national bank can be regarded as a permissible nonbanking activity under the Act. The Board on a number of occasions has expressed its views that an institution that is chartered as a bank and that accepts transaction accounts from the public should be subject to the policies that Congress has established for banks in the BHC Act.[2] Nevertheless, although the Board believes that approval of this proposal presents a serious potential for undermining the policies of the Act, the Board is constrained by the definition of bank in the Act to approve the application.

The Act defines a "bank" as an institution that both accepts demand deposits and engages in the business of making commercial loans. (12 U.S.C. § 1841(c)). In its recent action defining the term "bank," (12 CFR § 225.2(a)(1)); the Board acted to the extent possible consistent with the language, legislative history and policies of the Act to bring within the scope of the Act those institutions that the Board believes Congress intended to subject to the Act's limitations on conflicts of interests, concentration of resources, and excessive risk. It was the Board's intention, in part, to bring within the scope of the policies of the Bank Holding Company Act those institutions that engage in essential banking functions that the Board believes Congress intended to be covered by these policies.

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[2] *Citizens Corporation*, supra. See also *Citicorp*, 70 FEDERAL RESERVE BULLETIN 231 (1984); *Mellon National Corporation*, 70 FEDERAL RESERVE BULLETIN 234 (1984).

The activities proposed by Trust Company have been tested against this definition of bank. As noted above, Trust Company will accept demand deposits but not make commercial loans as defined by the Board in Regulation Y. Thus, Trust Company will not be a bank within the meaning of the Bank Holding Company Act. In this situation, where the applicant will not make commercial loans in Florida either directly or indirectly through any affiliate, the Board does not have the discretion to find that the proposal falls within the prohibitions on interstate acquisitions contained in section 3(d) of the Act (12 U.S.C. § 1842(d)), which only applies to the acquisition of banks as defined in section 2(c) of the Act.

The Board also has considered that companies other than bank holding companies have acquired banks that offer transaction accounts without being subject to the Act. The Board believes that it would be ineffective and inequitable to impose a competitive limitation only on bank holding companies by denying this proposal.

Protestants' Comments

Protestants argue, however, that the Board should view U.S. Trust Corporation as a single entity engaged in commercial banking operations by accepting demand deposits through U.S. Trust Company and in commercial lending through other subsidiaries in Florida in violation of section 3(d) of the Act. As noted, however, Applicant does not directly or indirectly engage in commercial lending through any subsidiary in Florida. Under these circumstances, the Board cannot conclude that Trust Company is a bank under the Act subject to the restrictions of section 3(d).

Protestants also argue that the proposal would violate the provision in Florida law that prohibits an out-

of-state bank holding company from acquiring "any bank or trust company having a place of business in [Florida] where the business of banking or trust business or functions are conducted." Florida Statutes, § 658.29(1). It is the Board's general policy to presume the constitutionality of state statutes unless there is clear and unequivocal evidence of the inconsistency of the state law with the federal Constitution.[3] In this case, the Supreme Court has held a predecessor to the Florida statute unconstitutional to the extent that it prohibited out-of-state bank holding companies from offering investment advisory services.[4] Moreover, a U.S. district court has recently held that the very Florida statute at issue in this case constitutes an unconstitutional burden on interstate commerce to the extent that it seeks to prevent out-of-state bank holding companies from operating in Florida entities that do not meet the definition of "bank" in the Bank Holding Company Act.[5] Accordingly, the proposal does not appear to be barred by any valid provision of state law.

Need for Congressional Action

The requirement of Board approval of this application under the provisions of existing law is one of a number of recent developments that underscore the critical need for Congressional action on legislation to apply the policies to the Bank Holding Company Act to institutions

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[3] *NCNB Corp.*, 68 FEDERAL RESERVE BULLETIN 54, 56 (1982). The Board has previously stated that it is doubtful that a state has the authority to impose a more stringent burden on interstate commerce than that contained in section 3(d). *KSAD, Inc.*, 70 FEDERAL RESERVE BULLETIN 44 (1984).

[4] *Lewis* v. *B.T. Investment Managers*, 477 U.S. 27 (1980).

[5] *Continental Illinois Corporation* v. *Lewis*, TCA 81-0944-WS (slip opinion dated December 13, 1983).

that are chartered as banks and that offer transaction accounts to the public. The recent decision of the Tenth Circuit Court of Appeals reversing the Board's interpretation of NOW accounts as demand deposits in connection with a bank holding company acquisition of a Utah industrial loan company,[6] and the continued acquisition of nonbank banks by securities, insurance, and other nonbanking organizations present the potential for a significant, haphazard, and possibly dangerous alteration of the banking structure without Congressional action on the underlying policy issues.

If the nonbank bank concept, particularly as expanded by the interpretation of demand deposit adopted by the Tenth Circuit, becomes broadly generalized, a bank holding company or commercial or industrial company, through exploitation of an unintended loophole, could operate "banks" that offer NOW accounts and make commercial loans in every state, thus defeating Congressional policies on commingling of banking and commerce, conflicts of interest, concentration of resources and excessive risk, or with respect to limitations on interstate banking. Congressional action thus is urgently needed to ensure that the policies of the Act are maintained. In this regard, the Board does not believe that any public policy would be served by grandfathering proposals such as this that occur subsequent to the introduction of legislation that would otherwise prohibit such transactions.

Other Considerations

There is no evidence that consummation of this proposal would result in any conflicts of interest, unsound

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[6] *First Bancorporation* v. *Board of Governors*, (10th Cir. 1984), slip opinion dated February 21, 1984). The Board is seeking a rehearing of the case before the Tenth Circuit.

banking practices, or other adverse effects. The Board believes it is appropriate, however, to take action to ensure that Trust Company is not used by Applicant as a vehicle for evasion of section 3(d). Accordingly, the Board has determined to make its approval subject to the conditions that:

(1) Applicant will not operate Trust Company's demand deposit taking activities in tandem with any other subsidiary or other financial institutions;

(2) Applicant will not link in any way the demand deposit and commercial lending services that define a bank under the Act; and

(3) Trust Company will not engage in any transactions with affiliates, other than the payment of dividends to Applicant or the infusion of capital by Applicant into Trust Company, without the Board's approval.

Protestants have requested a hearing because of the serious policy issues raised by the subject proposal and because they claim that there are certain factual questions that need clarification. The Board has concluded that the issues in this case are legal in nature and that there are no material factual issues in dispute that would warrant a hearing on the application. Accordingly, Protestants' hearing request is denied.

Based upon the foregoing and all the facts of record, the Board has determined that the balance of public interest factors it is required to consider under section 4(c)(8) is favorable. Accordingy, the application is hereby approved. This determination is subject to the conditions set forth in this Order with respect to transactions and operations in tandem with any other subsidiary of Applicant or other financial institutions and

the conditions set forth in section 225.23(b) of Regulation Y (12 CFR § 225.23(b)). The approval is also subject to the Board's authority to require modification or termination of the activities of the holding company or any of its subsidiaries as the Board finds necessary to assure compliance with the provisions and purposes of the Act and the Board's reguiations and orders issued thereunder, or to prevent evasion thereof.

This transaction shall not be consummated later than three months after the effective date of this Order, unless such period is extended for good cause by the Board, or by the Federal Reserve Bank of New York, pursuant to delegated authority.

By order of the Board of Governors, effective March 23, 1984.

Voting for this action: Chairman Volcker and Governors Martin, Wallich, and Partee. Voting against this action: Governor Rice. Absent and not voting: Governors Teeters and Gramley.

JAMES MCAFEE,
[SEAL] *Associate Secretary of the Board*

Dissenting Statement of Governor Rice

I agree with the Board's order to the extent that it recognizes the serious implications of this proposal and makes strong recommendations for Congressional action. Although the majority fees compelled to approve the application on grounds that U.S. Trust Company does not come within the Board's broad definition of "bank," I would deny the proposal because it would have the practical effect of permitting a bank holding company to engage in interstate banking without express authorization of state law in a manner that would otherwise be

prohibited by the Douglas Amendment. It also provides a precedent for acquisitions of national banks that accept demand deposits by nonbanking organizations without regard to the fundamental policy of the Bank Holding Company Act against commingling of banking and commerce.

In my view, the Board is not limited by the technical definition of "bank" and has authority to deny this application using its broad discretionary powers to take appropriate action to prevent evasions of the Act. Moreover, under section 4(c)(8) of the Act, the Board may deny a proposal if it determines that the adverse effects of the proposal are not outweighed by any public benefits associated with the proposal. I believe that the adverse effects of this proposal are so seriously adverse as to outweigh any public benefits. Accordingly, I would deny the proposal.

March 23, 1984

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-3269, 84-3270

FLORIDA DEPARTMENT OF BANKING AND FINANCE,
Petitioner,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Respondent.

FLORIDA BANKERS ASSOCIATION,
and SUN BANK/PALM BEACH,
Petitioners,

v.

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Respondent.

May 20, 1985

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Bowman Brown, Shutts & Bowen, Miami, Fla., Vaughn C. Williams, Skadden, Arps, Slate, Meagher & Flom, New York City, for intervenor-respondent.

On Review of an Order of the Board of Governors of the Federal Reserve System

Before RONEY and TJOFLAT, Circuit Judges, and BROWN *, Senior Circuit Judge.

JOHN R. BROWN, Circuit Judge:

I. *Overview*

This action is a petition, pursuant to 12 U.S.C. § 1848, for review of an order of the Board of Governors of the Federal Reserve System (the Board). In its order,[1] the Board, acting pursuant to the Bank Holding Company Act of 1956 (as amended), 12 U.S.C. § 1841 *et seq.*, approved the application of a New York bank holding company, U.S. Trust, to expand the nonbanking activities of its wholly owned Florida subsidiary (Trust Company).

II. *The Legislative Framework*

The Bank Holding Company Act (the Act) constitutes a comprehensive federal framework for the supervision and regulation of bank holding companies—companies that control one or more banks. Section 2(c) of the Act

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* Honorable John R. Brown, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

[1] The order was dated March 23, 1984.

contains the statutory definition of "bank." Bank is defined as any institution that: (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. 12 U.S.C. § 1841(c). Section 3 of the Act deals with a bank holding company's acquisition of banks. 12 U.S.C. § 1842(a). Under this section, a bank holding company may not acquire control of any additional bank without prior approval of the Board. Section 3(d) of the Act,[2] commonly referred to as the "Douglas Amendment," prohibits the Board from approving the acquisition of any bank by a bank holding company whose principal operations are conducted in another state, unless the acquisition of the bank by an out-of-state bank holding company is expressly authorized by the statute laws of the state in which the bank to be acquired is located. 12 U.S.C. § 1824(d). In other words, the Douglas Amendment proscribes interstate bank acquisitions by bank holding companies unless the state where the bank to be acquired allows such acquisitions by statute. Section 4 of the Act deals with the regulation of nonbank

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[2] Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 1823(f) of this title) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

activities. Section 4 generally prohibits a bank holding company from acquiring an entity engaged in nonbank activity. Section 4(c)(8) of the Act contains the principal exception to this prohibition. It authorizes board approval of acquisitions of nonbanking activities which are "closely related" to and a "proper incident" of banking. Section 5 of the Act confers certain enforcement powers upon the Board. Specifically, § 5(b), 12 U.S.C. § 1844 (b), authorizes the Board to issue regulations and orders to carry out the purposes of the Act and to prevent evasions of it.

III. *The U.S. Trust Application*

U.S. Trust is a bank holding company whose sole commercial bank subsidiary is located in New York, New York. On November 8, 1983, U.S. Trust applied for the Board's approval of a proposal to expand the nonbanking activities of its nonbanking subsidiary in Florida. The proposed expansion included the acceptance of time and demand deposits (including checking accounts) and the making of consumer loans. U.S. Trust's Florida subsidiary had previously been established as a Florida chartered nondeposit trust company. This subsidiary had provided fiduciary, investment, advisory, and custody services to its clients in Palm Beach, Florida. In May of 1984, U.S. Trust completed the conversion of its state chartered trust subsidiary into a national association, called Trust Company. It is now U.S. Trust's only subsidiary in Florida. Trust Company continues to provide the above mentioned trust services, as well as the services now authorized by the Board's order. This conversion occurred with the approval of the United States Comptroller of the Currency. Specifically, the Comptroller approved the conversion of Trust Company into a nonbank on the express condition that Trust Company

"not engage in the business of making commercial loans."

IV. *Action of the Board*

After the Board issued public notice of U.S. Trust's application, the Florida Department of Banking and Finance, the Florida Bankers Association, and the Sun Bank/Palm Beach filed comments and requested that the Board conduct a hearing on the U.S. Trust application.[3]

The Board issued its order approving U.S. Trust's application for Trust Company to operate as a nonbank on March 23, 1984. That order specified several conditions for approval of the application. U.S. Trust was ordered to not:

(1) operate Trust Company's demand deposit-taking activities in tandem with any other subsidiary or other financial institutions;

(2) link in any way the demand deposit and commercial lending services that define a bank under the Act; and

(3) have Trust Company engage in any transactions with affiliates, other than the payment of dividends to U.S. Trust or the infusion of capital by U.S. Trust into Trust Company without the Board's approval.

Since these conditions precluded Trust Company from engaging in commercial lending, the Board found that Trust Company was not a "bank" within the meaning of Section 2(c) of the Act. The Board's order lamented that although "approval of this proposal presents a serious potential for undermining the policies of the Act, the Board is constrained by the definition of bank in the Act

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[3] These parties will be collectively referred to as petitioners.

to approve the application." The Board further rejected the petitioners' request for an evidentiary hearing, deeming the issues in the application to be legal in nature not warranting a hearing on factual issues. All of petitioners' requests for reconsideration were denied by the Board. The Board also refused to stay its order. Although it sanctioned the U.S. Trust application, the Board was plainly unenthusiastic about the course it was adopting. The order itself contained a plea for Congressional action because:

> if the nonbank concept, particularly as expanded by the interpretation of demand deposit adopted by the Tenth Circuit,[4] becomes broadly generalized, a bank holding company or commercial or industrial company, through exploitation of an unintended loophole, could operate "banks" that offer NOW accounts and make commercial loans in every state, thus defeating congressional policies on commingling of banking and commerce, conflicts of interest, concentration of resources and excessive risk, or with respect to limitations on interstate banking. Congressional action thus is urgently needed to ensure that the policies of the Act are maintained. In this regard, the Board does not believe that any public policy would be served by grandfathering proposals such as this that occur subsequent to the introduction of legislation that would otherwise prohibit such transactions.

Thus, the Board, in the very order granting U.S. Trust's application, emphasized its prior opinions that "an institution that is chartered as a bank and that ac-

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[4] *First Bancorporation v. Board of Governors*, 728 F.2d 434 (10th Cir. 1984). The board is seeking a rehearing of this case—which involved the issue of whether a negotiable order of withdrawal (Now) account was a demand deposit for purposes of the Act—before the Tenth Circuit.

cepts transaction accounts from the public should be subject to the policies that Congress has established for banks in the BHC Act." Order at 3. *See* Citizens Fidelity Corp., 69 Federal Reserve Bulletin 556 (1983); Citicorp, 70 Federal Reserve Bulletin 921 (1984); Mellon National Corp., 70 Federal Reserve Bulletin 441 (1984).

V. *Appeal to the Eleventh Circuit*

On April 23, 1984, the Florida Department of Bank and Finance petitioned us for review of the Board's order. The Florida Bankers Association and Sun Bank/Palm Beach filed similar petitions. U.S. Trust and the Conference of State Bank Supervisors then filed motions to intervene as a respondent and as a petitioner, respectively. We granted these motions.

VI. *Decision*

On its face, this appeal involves nothing more than a question of statutory interpretation. To state our problem so simply, however, is to belie its complexity. As we write, an avalanche of applications by bank holding companies seeking to establish hundreds of deposit-taking institutions across state lines is in progress.

The Board and U.S. Trust believe Congress' definition of a bank to be clear. They would have us rely on the well established principle of statutory construction that an agency or court cannot modify the clear language of a statutory provision. *See, e.g., American Tobacco Company v. Patterson*, 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982); *Central Trust Company v. Official Creditors Committee*, 454 U.S. 354, 102 S.Ct. 695, 70 L.Ed.2d 542 (1982). Petitioners counter with the equally well established rule of statutory interpretation that courts ought not to apply the literal terms of a statute to reach a result contrary to the underlying policy of

Congress. They rely on the many reported decisions where courts have gone beyond the face of the statute to ascertain congressional intent and purpose. *See, e.g., United States v. American Trucking Association*, 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940);[5] 2A Sutherland, *Statutes and Statutory Construction*, § 46.07 (C. Sands 4th ed. 1973).

In its order, the Board concluded that the Act's definition of bank in § 2(c) did not permit a more expansive interpretation on which to deny thhe U.S. Trust application. In effect, the Board was persuaded to approve the U.S. Trust application by the argument that the Act is a comprehensive regulation of the banking industry with carefully defined terms. The Board was reluctant to look through the definition of bank to see the substance of the U.S. Trust application. Although we believe the words used by Congress to define bank to be clear in the sense that a meaning is intelligible, that is not tantamount to a decision that we should inquire no further. Literalism in statutory interpretation, when it is contrary to an express purpose of the Act, cannot be a talisman.

(a) *The Changing Definition of Bank*

Congress twice has amended the Act's definition of bank prior to the present controversy. In each prior case,

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[5] There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even *when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words.* (emphasis supplied).

the legislative history leaves no doubt that the purpose of the amendment was to delineate more clearly which institutions would be subject to regulation under the Act in light of the Board's experiences with regulation. The original 1956 Act defined bank in terms of the charter of the entity. This first definition included "any national banking association or state bank, savings bank, or trust company." [6] Chapter 240, § 2(c), 70 Statutes 133. In 1966 Congress amended the Act to provide a narrower definition of bank. This definition included only institutions "that accepts deposits payable on demand." [7] This amendment was specifically intended to exclude savings and industrial banks, thus leaving only commercial banks subject to the Board's regulation.[8] As the Senate report stated, the deposit test has long been the accepted definition of what constitutes a commercial bank.

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[6] (c) "Bank" means any national banking association or any State bank, savings bank, or trust company, but shall not include any organization operating under sections 611 and 612 of this title, or any organization which does not do business within the United States. "State member bank" means any State bank which is a member of the Federal Reserve System. "District bank" means any State bank organized or operating under the Code of Law for the District of Columbia.

[7] (c) "Bank" means any institution that accepts deposits that the depositor has a legal right to withdraw on demand, but shall not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization that does not do business within the United States. "District bank" means any bank organized or operating under the Code of Law for the District of Columbia.

[8] Savings banks are financial institutions organized historically "to encourage thrift among persons of modest means by paying interest dividends on savings deposited therein." G.G. Munn, Encyclopedia of Banking and Finance (8th ed.), 852. Industrial banks are those institutions which are chartered by state law to extend installment credit to consumers and to accept some form of savings deposit or sell investment certificates or certificates of deposit as a means of financing the operation. *See* Industrial Banks as Thrift Institutions, American Financial Service Association Research Report (1982).

> Section 2(c) of the Act [i.e. prior to its amendment in 1966] defines "bank" to include savings banks and trust companies, as well as commercial banks. The purpose of the Act was to restrain undue concentration of control of commercial bank credit, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its non-banking subsidiaries. This objective can be achieved without applying the Act to savings banks, and there are at least a few instances in which the reference to "savings bank" in the present definition may result in covering companies that control two or more industrial banks. *To avoid this result, the bill redefines "bank" as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies.*

Senate Report No. 1179, 89th Cong., 2d Sess. 7, reprinted in 1966 U.S. Code Cong. & Adm. News 2385, 2391. (emphasis added)

In 1970, Congress again amended the Act's definition of bank.[9] This amendment, which is the definition pres-

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[9] (c) "*Bank*" means any institution organized under the laws of the United States, any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, except an institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or an institution chartered by the Federal Home Loan Bank Board, which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. Such term does not include any organization operating under section 25 or section 25(a) of the Federal Reserve Act, or any organization which does not do business within the United States except as an incident to its activities outside the United States. "District bank" means any bank organized or operating under the Code of Law for the District

ently before us, added the requirement that an entity make commercial loans, as well as accept demand deposits, to be a bank. 12 U.S.C. § 1841(c)(2), Public Law No. 91-607, § 101(c), 84 Statutes 1762 (1970). The Report of the Senate Committee on Banking and Currency explained the 1970 amendment as follows:

> The definition of "bank" adopted by Congress in 1969 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the Act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would exclude institutions that are not engaged in the business of making commerical loans from the definition of "bank."

Senate Report No. 1084, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 5519, 5541. Crucial to an understanding of our present problem is the widespread impression throughout Congress that the 1970 amendment was predicted to have an extremely narrow impact. As the legislative history reveals, in 1970 there was only one significant financial institution, the Boston

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of Columbia. The term "bank" also includes a State chartered bank or a national banking association which is owned exclusively (except to the extent directors' qualifying shares are required by law) by other depository institutions or by a bank holding company which is owned exclusively by other depository institutions and is organized to engage exclusively in providing services for other depository institutions and their officers, directors, and employees.

Safe Deposit and Trust Company, that accepted demand deposits but made no commercial loans.[10]

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[10] Specifically, in response to an inquiry from the Senate Committee on Banking and Currency, Governor Robertson of the Board advised:

> [*T*]*his amendment would have very limited application at present, possibly affecting only one institution.* Since there is less need for concern about preferential treatment in extending credit where no commercial loans are involved, and in view of the very limited application of this amendment, the Board would have no objection to its adoption.

One-Bank Holding Company Legislation of 1970: Hearings on S.1052, et al. before the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess., 136-37 (1970) (emphasis added). The one institution affected by the amendment was the Boston Safe Deposit and Trust Company, evidently the only bank at the time which accepted demand deposits but engaged in no commercial lending. *See* 116 Cong. Rec. 25848 (1970) (remarks of Representative Gonzalez).

Indeed, the redefinition of bank can be seen as a bit of local favoritism on the part of Senator Brook of Massachusetts. The two part definition appeared to exempt a valued local institution without affecting other commercial banks. This redefinition of bank brings to mind Congress' action when dealing with the Dupont Trust in Florida as it originally passed the Act in 1956. The trust, which owned several banks and thus would have come under the regulation of the Board, received a narrowly tailored exception for charitable trusts and was exempted from the original scope of the Act. As the Senate Report discussing abolition of the trust exemption makes clear, No. 1179, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Ad. News 2385, 2387-88:

> The principal entity which now receives the benefit of the exemption for long-term trusts and which in the course of time would become a charitable institution is the Alfred I. du Pont trust fund, created under the will of the late Alfred I. du Pont. This is a perpetual testamentary trust under which the testator's widow was left virtually all of the income during her life subject to annuities, and thereafter the entire income would be payable to the Nemours Foundation, a charitable institution primarily for the benefit of crippled children. A 12-percent share of the life tenant's income has been irrevocably assigned to the Nemours Foundation.

The DuPont trust controlled 30 banks in Florida, together with sizeable nonbank businesses. Thus, technical amendments to favor specific limited local interests have had a place in the Act since its original passage.

(b) *The Purpose of the Act*

The legislative history reveals that Congress had three purposes in adopting the Act in 1956. The first two, which the Board and U.S. Trust acknowledge, were to prevent bank holding companies from (1) acquiring additional banks in a manner which would concentrate banking facilities within a particular area, and (2) combining under single control both banking and non-banking enterprises in a manner which would enable holding companies to use bank deposits to finance unrelated non-banking activities. It seems to us, however, that the Board and U.S. Trust ignore the third purpose of Congress, namely, to prohibit the creation of interstate deposit-taking networks by bank holding companies without specific state authorization.

Congress' desire to prevent bank holding companies from acquiring deposit-taking banks across state lines without state authorization was expressed dramatically in its adoption of the Douglas amendment.[11] That amendment, which remains essentially unaltered since the passage of the original Act, was designed to place federal power on the side of state control over banking. The Douglas amendment made the expansion of banking in a state by out-of-state bank holding companies subject to that state's direct and express approval. Such federal deference to state policies was made clear by Senator Douglas when he likened his amendment to the McFadden Act, 12 U.S.C. § 36. In the McFadden Act Congress prohibited national banks from establishing interstate branches (defined as any facilities which receive deposits or paychecks or make loans) unless state law expressly permitted state banks to establish intrastate branches.

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[11] *See* footnote 2.

With our examination of Congress' goals in adopting the Act behind us, we now consider the question of whether it is reasonable to conclude that Congress intended in 1970 to destroy the Douglas Amendment by adopting an amendment to the definition of bank which would permit bank holding companies to establish an unlimited number of deposit-taking banks across state lines without state approval. Merely to articulate this question in the light of the traditional Congressional concern that banking be subject to the local goals and policies of the states demonstrates the unreasonableness of the U.S. Trust position. We cannot persuade ourselves to employ literalism in statutory interpretation in order to bootstrap Congress' technical amendment of the definition of bank—after being told that the amendment would apply to only a single institution [12]—into a total emasculation of the long held policy giving states control over bank expansion. State control over banking, and the expansion and availability of branches, has been the consistent policy of Congress since passage of the Act in 1956. Viewed in historical perspective, state control over banking has been an important issue in American politics since the charter of the First Bank of the United States.[13]

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[12] *See* footnote 8.

[13] Dispute over control of banking reached a crisis in Andrew Jackson's war on the recharter of the Bank of the United States. Even though historians have viewed Nicholas Biddle as a good, if somewhat despotic President of the Bank, and Andrew Jackson's precipitous withdrawal of federal moneys from the bank as instrumental in bringing on a nationwide panic, the war for recharter was in reality an extended debate over who would control banking. Jackson sided with state control by placing federal deposits in state chartered banks. Biddle's monster bank was slain since neither Clay nor Webster were able to ride the bank issue into the White House.

From that time until the passage of modern banking legilsation in this century, the federal government has not used its power to permit uncontrolled expansion by banks. Indeed, as above mentioned, it was precisely the development of the bank holding com-

There is no dispute that U.S. Trust will accept demand deposits and would therefore be a commercial bank within the commonly accepted test set forth in the 1966 amendment to the definition of bank. For Congress to have completely reversed its field only four years later and to have decided that all commercial banks accepting demand deposits would no longer be subject to the structures of the Douglas amendment unless they also made commercial loans indicates a dramatic change of heart. Such a change of heart is usually accompanied by protracted debate in Congress. Indeed, the *raison' d'etre* of legislative history is to illumine such shifts in thinking on the part of Congress. However, not even U.S. Trust, let alone the Board, can glean from the legislative history of the 1970 amendment to § 2(c) such a change in congressional intent.

We are reluctant to attribute to a technical amendment, in the absence of compelling legislative history, Congress' intention to abandon a central part of the policies leading to the passage of the 1956 Act. Without such expression on the part of Congress, the wholesale expansion of deposit-taking institutions across state lines cannot be justified in violation of the Douglas amendment. The more reasonable interpretation of the 1970 amendment is that Congress intended to exempt, much like it did with the Dupont Trust in 1956,[14] a single intrastate institution—or perhaps the very few entities similarly situated—which could be excluded from regulation under the Act without giving rise to the kind of

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pany—with the concern this phenomena generated about the concentration of financial power—that led to passage of the Bank Holding Company Act of 1956. Congress rendered state control over bank expansion explicit in the 1956 Act when it adopted the Douglas Amendment.

[14] *See* footnote 8.

abuses which the Douglas amendment was designed to prevent.[15]

To have us avoid consideration of the Douglas amendment, and its policy of state control over bank expansion, U.S. Trust and the Board focus on § 4(c)(8), which permits bank holding companies to acquire nonbanking activities that are closely related to banking. They argue that Congress' purpose in passing this provision was "to permit the introduction of new innovative competitive vigor into those markets which would benefit therefrom." House Report No. 1747, 91st Cong., 2d Sess. reprinted in 1970 U.S. Code Cong. & Ad. News 5561, 5568. U.S. Trust would have us rely upon the conclusion in the Board's opinion that "there is no evidence that consummation of this proposal would result in any conflicts of interest, unsound banking practices, or other adverse effects." Such a conclusion on the part of the Board must be tempered by an understanding that the majority of the Board voted to approve the U.S. Trust application because of their belief that they were constrained to do so by the literal definition of bank. As the dissent clearly stated:

> although the majority feels compelled to approve the application on grounds that U.S. Trust Company

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[15] We are aware, of course, that the Tenth Circuit Court of Appeals in its recent decision in *Dimension Financial Corp. v. Board of Governors of the Federal Reserve System*, 744 F.2d 1402 (10th Cir. 1984), has concluded the 1970 amendment to § 2(c) "permitted the development of the nonbank banks . . . and contemplated that some institutions would not be included [as banks under the Act]." In its decision setting aside the Board's new definition of commercial loan in Regulation Y, 12 C.F.R. part 225, § 225.2, the Tenth Circuit did not, however, rule specifically on whether nonbank banks could be established without regard to the Douglas Amendment. The Board is seeking a rehearing before the Tenth Circuit. We acknowledge that our present decision is in conflict with some of the language used by the Tenth Circuit in *Dimension*.

> does not come within the Board's broad definition of "bank," I would deny the proposal because it would have the practical effect of permitting a bank holding company to engage in interstate banking without express authorization of state law in a manner that would otherwise be prohibited by the Douglas Amendment. . . . Moreover, under section 4(c)(8) of the Act, the Board may deny a proposal if it determines that the adverse effects of the proposal are not outweighed by any public benefits associated with the proposal.

The dissent clearly believed that U.S. Trust urges a position that is plainly inconsistent with the purpose of the Douglas Amendment to prevent undue concentration of power and certain conflicts of interest. Even the majority, which felt constrained to approve the U.S. Trust application, was concerned that "if the nonbank concept . . . becomes broadly generalized, a bank holding company . . . through exploitation of an unintended loophole, could operate 'banks' . . . defeating Congressional policies on interstate banking." [16] Accordingly, we cannot accept U.S. Trust's argument that the fact that the Board approved its application, however reluctantly, ends any further inquiry on our part. Our duty is to review the decision of the Board and ascertain whether it has correctly followed the congressional policies expressed in the Act. We perceive the U.S. Trust application to be a violation of the Douglas Amendment; such a violation cannot be justified by the Board's power under § 4(c)(8) to approve activities closely related to banking. Activities approved as closely related to banking have been the acquisition of brokerage services or the offering of credit life insurance, are the wholesale abandonment of one of Con-

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[16] *See* page 1138.

gress' chief goals in enacting the Bank Holding Company Act.

Additionally, we believe U.S. Trust's argument that its nonbank will have an innovative and competitive effect on the market for financial resources in Florida to be erroneous. Since U.S. Trust cannot make commercial loans in Florida from the deposits it attracts, it is patent that Florida's policy of having local money available for local development will be hindered. While it is true that funds can be secured from out-of-state—indeed from U.S. Trust in New York—such a policy is directly contrary to the accepted notion that local funding of local projects is a significant and important incident of state control over banking. It suffices that Florida has spoken clearly that it does not want out-of-state bank holding companies to establish banking operations in Florida.[17] To approve the U.S. Trust application would destroy Florida's state policy to not allow the unfettered expansion of out-of-state bank holding companies. More importantly, such approval would also destroy the important federal policy embodied in the Douglas amendment—a federal policy which allows the state to choose for itself whether to open its borders to out-of-state banks.

(c) *The Board's Power to Deny the U.S. Trust Application*

We hold that the Board should have used its power under § 5(b), 12 U.S.C. § 1844(b), to prevent evasion

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[17] The Board's and U.S. Trust's reliance on *Lewis v. B.T. Investment Managers*, 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980), is misplaced. In that case the Court struck down a Florida statute which prohibited out-of-state bank holding companies from offering investment advisory services despite Board approval. Such services are incidents of banking requiring Board approval under the Act. This decision cannot be relied upon for the proposition that banks—deposit-taking institutions—can be established across state lines despite the Douglas Amendment.

by U.S. Trust of the fundamental purposes of the Act. Section 5(b) expressly authorizes the Board "to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of [the Act] and prevent evasions thereof." The rationale of the Third Circuit in *Wilshire Oil Co. v. Board of Governors*, 668 F.2d 732 (3d Cir. 1981), *cert. denied*, 457 U.S. 1132, 102 S.Ct. 2958, 73 L.Ed.2d 1349 (1982), supports such a use of the Board's delegated authority under § 5(b). Wilshire Oil Company's bank subsidiary, which accepted demand deposits and made commercial loans, notified its demand deposit customers that in the future it would reserve the right to require 14 days notice before any withdrawal could be made from their accounts. The bank, however, also notified its customers that it had no intention of exercising this right. In other words, the bank in practice continued to accept demand deposits and make commercial loans even though the depositors technically had no legal right to immediately receive their money. Thus, the bank argued it no longer met the definition of a bank in § 2(c) because Congress in the 1970 amendments defined bank to require demand deposits and commercial loans. The Board had no trouble looking through the form of the bank's reorganization to its substance. The Board disregarded the technical nonconformity with the definition of bank and ruled that the subsidiary was still acting as a bank and was subject to the Act. While *Wilshire* is distinguishable in the sense that the bank was blatantly attempting to evade the Act, its rationale that the Board under § 5(b) had the power to disregard the form of a reorganization and look to its substance supports a similar use of the § 5(b) power by the Board in this case. The Board is Congress' custodian of the Act. In that capacity, it is charged with insuring compliance with Congress' goals even when Congress muddies the waters.

VII. *Conclusion*

Since we held that the Board should have used its authority under § 5(b) to deny the U.S. Trust application, we express no opinion on the constitutionality of the Florida statute or the parties' contention that an evidentiary hearing was required by the Board prior to its action.

REVERSED.

SUPREME COURT OF THE UNITED STATES

No. 84-1274

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Petitioner,

v.

DIMENSION FINANCIAL CORPORATION *et al.*
Respondents.

Argued Nov. 4, 1985

Decided Jan. 22, 1986

Michael Bradfield, Washington, D.C., for the petitioner.

Jeffrey S. Davidson, Washington, D.C, for the respondents, Dimension Financial Corporation, et al.

John D. Hawke, Jr., Washington, D.C., for the respondents, American Financial Services, et al.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Federal Reserve Board acted within its statutory authority in defining "banks" under § 2(c) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.*, as any institution that (1) accepts deposits that "as a matter of practice" are payable on demand and (2) engages in the business of making "any loan other than a loan to an individual for personal, family, household, or charitable

purposes" including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." 12 CFR § 225.2(a)(1) (1985).

I

A

Section 2(c) of the Bank Holding Company Act defines "bank" as any institution "which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 70 Stat. 133, as amended, 12 U.S.C. § 1841(c).

This case is about so-called "nonbank banks"—institutions that offer services similar to those of banks but which until recently were not under Board regulation because they conducted their business so as to place themselves arguably outside the narrow definition of "bank" found in § 2(c) of the Act. Many nonbank banks, for example, offer customers NOW (negotiable order of withdrawal) accounts which function like conventional checking accounts but because of prior notice provisions do not technically give the depositor a "legal right to withdraw on demand." 12 U.S.C. § 1841(c)(1). Others offer conventional checking accounts, but avoid classification as "banks" by limiting their extension of commercial credit to the purchase of money market instruments such as certificates of deposit and commercial paper.

In 1984, the Board promulgated rules providing that nonbanks offering the functional equivalent of traditional banking services would thereafter be regulated as banks. 49 Fed.Reg. 794. The Board accomplished this by amending its definition of a bank, found in "Regulation Y," in two significant respects. First, the Board de-

fined "demand deposit" to include deposits, like NOW accounts, which are "as a matter of practice" payable on demand. 12 CFR § 225.2(a)(1)(A) (1985). Second, the Board defined the "making of a commercial loan" as "any loan other than a loan to an individual for personal, family, household, or charitable purposes," including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments." 12 CFR § 225.2(a)(1)(B) (1985).

B

Cases challenging the amended Regulation Y were commenced in three Circuits and were consolidated in the United States Court of Appeals for the Tenth Circuit.[1] The Court of Appeals set aside both the demand deposit and commercial loan aspects of the Board's regulation. 744 F.2d 1402(1984). The court did not discuss the demand deposit regulation in detail, relying instead on the holding of an earlier Tenth Circuit case, *First Bancorporation v. Board of Governors*, 728 F.2d 434 (1984). In *First Bancorporation*, the court noted that the statutory definition of demand deposit is a deposit giving the depositor "a *legal right* to withdraw on demand." The court recognized that "withdrawals from NOW accounts are in actual practice permitted on demand." *Id.*, at 436. But, since the depositary institution retains a technical prior notice requirement it does not, for the purposes of Congress' definition of "bank," accept "deposits that the depositor has a legal right to withdraw on demand."

The Court of Appeals also concluded that the Board's new definition of "commercial loan" was at odds with

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[1] Cases filed in the United States Court of Appeals for the Fourth and Sixth Circuits were transferred to the Tenth Circuit pursuant to 28 U.S.C. § 2112(a).

the Act. The legislative history revealed that in passing § 2(c) Congress intended to exempt from Board regulation institutions whose only commercial credit activity was the purchase of money market instruments. Although agencies must be "able to change to meet new conditions arising within their sphere of authority," any expansion of agency jurisdiction must come from Congress and not the agency itself. 744 F.2d, at 1409. Accordingly, the Court of Appeals invalidated the amended regulations.

We granted certiorari. 471 U.S. ——, 105 S.Ct. 2137, 85 L.Ed.2d 495 (1985). We affirm.

II

The Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.*, vests broad regulatory authority in the Board over bank holding companies "to restrain the undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit." S.Rep. No. 91-1084, p. 24 (1970), U.S. Code Cong. & Admin.News 1970, pp. 5519, 5541. The Act authorizes the Board to regulate "any company which has control over any bank." 12 U.S.C. § 1841(a)(1).

The breadth of that regulatory power rests on the Act's definition of the word "bank." The 1956 Act gave a simple and broad definition of bank: "any national banking association or any State bank, savings bank, or trust company." 12 U.S.C. § 1841(c) (1964 ed.). Experience soon proved that literal application of the statute had the unintended consequence of including within regulation industrial banks offering limited checking account services to their customers. These institutions accepted " 'funds from the public that are, in actual practice, repaid on demand.' " Amend the Bank Holding Company Act of 1956: Hearings on S. 2253, S. 2418, and H.R. 7371 be-

fore a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess., 447 (1966) (letter to the Committee from J.L. Robertson, Member, Federal Reserve Board). Although including these institutions within the bank definition was the "correct legal interpretation" of the 1956 statute, the Board saw "no reason in policy to cover such institutions under this act." *Ibid.* Congress agreed, and accordingly amended the statutory definition of a bank in 1966, limiting its application to institutions that accept "deposits that the depositor has a legal right to withdraw on demand." [2]

The 1966 definition proved unsatisfactory because it too included within the definition of "bank" institutions that did not pose significant dangers to the banking system. Because one of the primary purposes of the Act was to "restrain undue concentration of . . . commercial credit," it made little sense to regulate institutions that did not, in fact, engage in the business of making commercial loans. S.Rep. No. 91-1084, p. 24 (1970), U.S. Code Cong. & Admin.News 1970, p. 5541. Congress accordingly amended the definition, excluding all institutions that did not "engag[e] in the business of making commercial loans." Since 1970 the statute has provided that a bank is any institution that:

> "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c).

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[2] The Senate Report explained, "the bill redefines 'bank' as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies." S.Rep. No. 1179, 89th Cong., 2d Sess., 7 (1966), U.S.Code Cong. & Admin. News 1970, pp. 2385, 2391.

III

In 1984, the Board initiated rulemaking to respond to the increase in the number of nonbank banks.[3] After hearing views of interested parties, the Board found that nonbank banks pose three dangers to the national banking system. *First*, by remaining outside the reach of banking regulations, nonbank banks have a significant competitive advantage over regulated banks despite the functional equivalence of the services offered. *Second*, the proliferation of nonbank banks threatens the structure established by Congress for limiting the association of banking and commercial enterprises. See 12 U.S.C. § 1843 (c) (8) (bank holding company can purchase nonbanking affiliate only if entity "closely related to banking"). *Third*, the interstate acquisition of nonbank banks undermines the statutory proscription on interstate banking without prior state approval. 49 Fed.Reg. 794, 835-836 (1984). Since the narrowed statutory definition required that both the demand deposit and the commercial loan elements be present to constitute the institution as a bank, the Board proceeded to amend Regulation Y redefining both elements of the test. We turn now to the two elements of this definition.

A

The Board amended its definition of "demand deposit" primarily to include within its regulatory authority institutions offering NOW accounts. A NOW account func-

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[3] The Board explained that since 1980 a large number of insurance, securities, industrial and commercial organizations have acquired FDIC insured financial institutions that are the functional equivalent of banks. The Board also noted that the powers of previously unregulated industrial banks "have substantially expanded . . . making them for all intents and purposes banks" for the purposes of the Bank Holding Company Act. 49 Fed.Reg., at 834.

tions like a traditional checking account—the depositor can write checks that are payable on demand at the depository institution. The depository institution, however, retains a seldom exercised but nevertheless absolute right to require prior notice of withdrawal. Under a literal reading of the statute, the institution—even if it engages in full scale commercial lending—is not a "bank" for the purposes of the Holding Company Act because the prior notice provision withholds from the depositor any "legal right" to withdraw on demand. The Board in its amended definition closes this loophole by defining demand deposits as a deposit, not that the depositor has a "legal right to withdraw on demand," but a deposit that "as a matter of practice is payable on demand."

In determining whether the Board was empowered to make such a change, we begin, of course, with the language of the statute. If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.

Application of this standard to the Board's interpretation of the "demand deposit" element of § 2(c) does not require extended analysis. By the 1966 amendments to § 2(c), Congress expressly limited the Act to regulation of institutions that accept deposits that "the depositor has a legal right to withdraw on demand." 12 U.S.C. § 1841(c). The Board would now define "legal right" as meaning the same as "a matter of practice." But no

amount of agency expertise—however sound may be the result—can make the words "legal right" mean a right to do something "as a matter of practice." A *legal* right to withdraw on demand means just that: a right to withdraw deposits without prior notice or limitation. Institutions offering NOW accounts do not give the depositor a legal right to withdraw on demand; rather, the institution itself retains the ultimate legal right to require advance notice of withdrawal. The Board's definition of "demand deposit," therefore, is not an accurate or reasonable interpretation of § 2(c).

B

Section 2(c) of the Act provides that, even if an institution accepts deposits that the depositor has a legal right to withdraw on demand, the institution is not a bank unless it "engages in the business of making commercial loans." Under Regulation Y, "commercial loan" means "any loan other than a loan to an individual for personal, family, household, or charitable purposes," including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments."

The purpose of the amended regulation is to regulate as banks institutions offering "commercial loan substitutes," that is, extensions of credit to commercial enterprises through transactions other than the conventional commercial loan. In its implementing order, the Board explained that "it is proper to include these instruments within the scope of the term commercial loan as used in the Act in order to carry out the Act's basic purposes: to maintain the impartiality of banks in providing credit to business, to prevent conflicts of interest, and to avoid concentration of control of credit." 49 Fed. Reg., at 841.

As the Board's characterization of these transactions as "commercial loan substitutes" suggests,[4] however, money market transactions do not fall within the commonly accepted definition of "commercial loans." The term "commercial loan" is used in the financial community to describe the direct loan from a bank to a business customer for the purpose of providing funds needed by the customer in its business. The term does not apply to, indeed is used to distinguish, extensions of credit in the open market that do not involve close borrower-lender relationships. Cf. G. Munn & F. Garcia, Encyclopedia of Banking and Finance 607 (1983). These latter money market transactions undoubtedly involve the indirect extension of credit to commercial entities but, because they do not entail the face-to-face negotiation of credit between borrower and lender, are not "commercial loans."

This common understanding of the term "commercial loan" is reflected in the Board's own decisions. Throughout the 1970's the Board applied the term "commercial loan" to exclude from regulation institutions engaging in money market transactions. For example, in *D.H. Baldwin Co.*, 63 Fed. Res. Bull. 280 (1977), the Board noted that although savings and loans participated in the Federal funds market and issued certificates of deposit, they were not "technically 'banks' for the purposes of the Act" because they did not make commercial loans. *Id.*, at 286. The Board recognized that savings and loans resembled banks but concluded that "the decision should be left to Congress whether, in light of the policies under-

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[4] The Board stated in its implementing order that "commercial paper is an important substitute for commercial loans." 49 Fed. Reg., at 840, n. 34. See also *Citicorp*, 69 Fed.Res.Bull. 921, 922 (1983) ("commercial loans include commercial loan substitutes as the purchase of commercial paper, bankers acceptances and certificates of deposit, and the sale of federal funds"); Hurley, The Commercial Paper Market, 63 Fed.Res.Bull. 525 (1977) ("commercial paper is an important substitute for bank credit").

lying the Bank Holding Company Act, such 'near-banks' should be treated as 'banks' or 'nonbanks.'" *Id.*, at 287. See also *American Fletcher Corp.*, 60 Fed. Res. Bull 868, 869, and n.8 (1974) (savings and loans participate in the federal funds market and offer certificates of deposit but may not be deemed "banks" within the meaning of the Act). In 1976, the Board's Legal Division found that broker call loans "do not appear to have the close lender-borrower relationship that is one of the characteristics of commercial loans." Letter to Michael A. Greenspan, from Baldwin P. Tuttle, Deputy General Counsel, pp. 2-3 (Jan. 26, 1976) (App. 100A-101A). A 1981 internal memorandum summarized the Board's longstanding interpretation of the commercial loan definition:

> "The Board also has concluded that, although commercial in nature, the purchase of federal funds, money market instruments (certificates of deposit, commercial paper, and bankers acceptances) are not considered commercial loans *for the purposes of section 2(c) of the Act*, despite the fact that for other statutory and regulatory purposes these instruments may be considered commercial loans." Federal Reserve System, Office Correspondence (Feb. 10, 1981) (App. 97A) (emphasis in original).[5]

The Board now contends that the new definition conforms with the original intent of Congress in enacting the "commercial loan" provision. The provision, the Board argues, was a "technical amendment to the Act

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[5] The Board contends that these decisions "represented a willingness by the Board to refrain from applying the full scope of the Act in conditions that did not appear to generate the potential for its evasion." 49 Fed.Reg., at 842. But the decisions themselves make no mention of such self-imposed restraint. Rather, the decisions represented the Board's interpretation of the meaning of the statute based on the language of the Act and the legislative history of its passage.

designed to create a narrowly circumscribed exclusion from the Act's coverage." Brief for Petitioner 41. The Board supports this revisionist view of the purpose of the "commercial loan" provision by citing a comment in the "legislative history" indicating that at the time the provision was enacted, it operated to exclude only one institution, the Boston Safe Deposit & Trust Co. The Board does not go so far as to claim that the commercial loan amendment was a private bill, designed only to exempt Boston Safe. It suggests, however, that because the amendment was prompted by the circumstances of one particular institution, the language "commercial loan" should be given something other than its commonly accepted meaning.

The statute by its terms, however, exempts from regulations *all* institutions that do not engage in the business of making commercial loans. The choice of this general language demonstrates that, although the legislation may have been prompted by the needs of one institution, Congress intended to exempt the class of institutions not making commercial loans. Furthermore, the legislative history supports this plain reading of the statute. The Senate Report explained:

> "The definition of 'bank' adopted by Congress in 1966 was designed to include commercial banks and exclude those institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit. However, the Federal Reserve Board has noted that this definition may be too broad and may include institutions which are not in fact engaged in the business of commercial banking in that they do not make commercial loans. The committee, accordingly, adopted a provision which would

> exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank.'" S. Rep. No. 91-1084, p. 24 (1970), U.S. Code Cong. & Admin. News 1970, p. 5541.

The only reference to Boston Safe is in a lengthy banking journal article that Representative Gonzalez entered into the Congressional Record. See 116 Cong. Rec. 25846, 25848 (1970) (indicating that Boston Safe was "[v]irtually the only bank that does no commercial lending"). Such a passage is not "legislative history" in any meaningful sense of the term and cannot defeat the plain application of the words actually chosen by Congress to effectuate its will. Finally, even if the legislative history evidenced a congressional intent to exclude only Boston Safe, which it does not, the Board's expansive definition of "commercial loan" would be an unreasonable interpretation of the statute. At the time the commercial loan provision was enacted, Boston Safe did not "make commercial loans," but did purchase money market instruments such as certificates of deposit and commercial paper. Recognizing the common usage of the term "commercial loan" and the purpose of the 1970 amendment, the Board in 1972 advised Boston Safe that it was not, in fact, a bank for the purposes of the Bank Holding Company Act:

> "The Board understands that Boston Safe purchases 'money market instruments,' such as certificates of deposit, commercial paper, and bank acceptances. In the circumstances of this case, such transactions are not regarded as commercial loans for the purposes of the Act." Letter to Lee J. Aubrey, Vice President, Federal reserve Bank of Boston, from Michael A. Greenspan, Assistant Secretary, Board of Governors, p. 2 (May 18, 1972) (App. 94A).

Nothing in the statutory language or the legislative history, therefore, indicates that the term "commercial loan" meant anything different from its accepted ordinary commercial usage. The Board's definition of "commercial loan," therefore, is not a reasonable interpretation of § 2(c).

C

Unable to support its new definitions on the plain language of § 2(c), the Board contends that its new definitions fall within the "plain purpose" of the Bank Holding Company Act. Nonbank banks must be subject to regulation, the Board insists, because "a statute must be read with a view to the 'policy of the legislation as a whole' and cannot be read to negate the plain purpose of the legislation." The plain purpose of the legislation, the Board contends, is to regulate institutions "functionally equivalent" to banks. Since NOW accounts are the functional equivalent of a deposit in which the depositor has a legal right to withdraw on demand and money market transactions involve the extension of credit to commercial entities, institutions offering such services should be regulated as banks.[6]

The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. *Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 590, 7 L.Ed.2d 492 (1962). Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the

[6] In a related argument, the Board contends that it has the power to regulate these institutions under § 5(b), which provides that the Board may issue regulations "necessary to enable it to administer and carry out the purposes of this chapter and prevent evasions thereof." 12 U.S.C. § 1844(b). But § 5 only permits the Board to police within the boundaries of the Act; it does not permit the Board to expand its jurisdiction beyond the boundaries established by Congress in § 2(c).

problems. Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of "the plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Without doubt there is much to be said for regulating financial institutions that are the functional equivalent of banks. NOW accounts have much in common with traditional payment-on-demand checking accounts; indeed we recognize that they generally serve the same purpose. Rather than defining "bank" as an institution that offers the functional equivalent of banking services, however, Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.[7]

If the Bank Holding Company falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the

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[7] The process of effectuating Congressional intent at times may yield anomalies. In *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), for example, we were confronted with the explicit language of a statute that in application produced a curious result. Noting that nothing prohibited Congress from passing unwise legislation, we upheld the enforcement of the statute as Congress had written it. Congress swiftly granted relief to the petitioner in *Hill*; but did so in a fashion that could not have been tailored by the courts. See Pub.L. 95-632, § 5, 92 Stat. 3760.

Board or the courts, to address. Numerous proposals for legislative reform have been advanced to streamline the tremendously complex area of financial institution regulation. See, *e.g.*, Blueprint for Reform: Report of the Task Group on Regulation of Financial Services (July 1984). Our present inquiry, however, must come to rest with the conclusion that the action of the Board in this case is inconsistent with the language of the statute for here, as in *TVA v. Hill*, 437 U.S. 153, 194, 98 S.Ct. 2279, 2301, 57 L.Ed.2d 117 (1978), "[o]nce the meaning of an enactment is discerned . . . the judicial process comes to an end."

Affirmed.

Justice WHITE took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 85-193

U.S. TRUST CORPORATION,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,
Respondents.

Case below, *Florida Department of Banking and Finance v. Board of Governors of the Federal Reserve System*, 760 F.2d 1135.

Jan. 27, 1986. On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. ——, 106 S.Ct. 681, —— L.Ed.2d —— (1986).

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 84-3269, 84-3270

FLORIDA DEPARTMENT OF BANKING AND FINANCE,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

FLORIDA BANKERS ASSOCIATION,
and Sun Bank/Palm Beach,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent.

Oct. 6, 1986

S. Craig Kiser, Fla. Dept. of Banking & Finance, Carl B. Morstadt, Tallahassee, Fla., for Fla. Dept. of Banking & Finance.

James F. Bell, Jones, Day, Reavis & Pogue, Arthur E. Wilmarth, Jr., Washington, D.C., for Conference of State Bank Supr's.

Richard M. Ashton, James A. Michaels, Office of Gen. Counsel, Bd. of Governors of Federal Reserve System,

Washington, D.C., for Bd. of Governors of Federal Reserve System.

Bowman Brown, Shutts & Bowen, Miami, Fla., Vaughn C. Williams, Skadden, Arps, Slate, Meagher & Flom, New York City, for U.S. Trust Corp.

J. Thomas Cardwell, Orlando, Fla., for Fla. Bankers Ass'n and Sun Bank/Palm Beach.

Petitions for Review of an Order of the
Board of Governors Federal Reserve System

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and BROWN *, Senior Circuit Judge.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

BROWN, Senior Circuit Judge:

The Supreme Court, by order of January 30, 1986, —— U.S. ——, 106 S.Ct. 875, 88 L.Ed.2d 913, vacated our decision in *Florida Department of Banking and Finance v. Board of Governors*, 760 F.2d 1135 (11th Cir. 1985), and remanded the case for further consideration in light of its recent decision in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. ——, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986). The *Dimension* decision squarely rejects the reasoning behind our vacated opinion and, consequently, we affirm the order of the Board of Gover-

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* Honorable John R. Brown, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

nors of the Federal Reserve System (the Board) approving the application of U.S. Trust Corporation to expand the nonbanking activity of its wholly owned "nonbank bank" Florida subsidiary.

What We Said

The facts of this case are laid out in detail in our earlier opinion, 760 F.2d at 1136-38, and we shall not repeat them here. Suffice it here to say that we reversed the Board's approval of U.S. Trust's application on the grounds that the Board should have used its rulemaking power under § 5(b) of the Bank Holding Company Act (the Act), 12 U.S.C. § 1844(b), to prevent U.S. Trust's evasion of the Douglas Amendment.[1] We based our decision on a lengthy review of the legislative history of the term "bank" as used in the Act. We concluded that Congress twice amended the definition of "bank," once in 1966 and once in 1970, with the intention of exempting first, a small class of savings and industrial banks, and second, one specific institution, the Boston Safe Deposit

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[1] Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 1823(f) of this title) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank of an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

12 U.S.C. § 1842(d)(1).

and Trust Company.[2] But without evidence that Congress in its amendments intended to weaken the stricture against interstate banking contained in the Douglas Amendment, we ordered the Board to preserve congressional intent as expressed in the Douglas Amendment and deny U.S. Trust's application.

What They Said

In *Board of Governors v. Dimension Financial Corp.*, 474 U.S. ——, 106 S.Ct. 681, 88 L.Ed.2d 691 (1986),

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[2] The original 1956 Act defined "bank" to include any institution that could obtain a bank charter. Chapter 240, § 2(c), 70 Stat. 133 ("any national banking association or any State bank, savings bank, or trust company"). In 1966, Congress amended the definition to include only those institutions offering "deposits that the depositor has a legal right to withdraw on demand," i.e., checking accounts. 1966 Amendments, Pub. L. No. 89-485, § 3, 80 Stat. 236, 237. In 1970, Congress further amended the Act to remove from the "bank" definition institutions that did not make commercial loans. 1970 Amendments, Pub. L. No. 91-607, § 101(c), 84 Stat. 1760, 1762 (codified at 12 U.S.C. § 1841(c)).

The legislative history of these amendments indicates that in 1966, Congress intended to maintain the traditional separation between banking and the industrial and securities sectors of the economy. *See* S. Rep. No. 1179, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385, 2391 ("the bill redefines 'bank' as an institution that accepts deposits payable on demand (checking accounts), the commonly accepted test of whether an institution is a commercial bank so as to exclude institutions like industrial banks and nondeposit trust companies"). In 1970, Congress again intended to keep separate banking and commerce by eliminating the so-called "one bank loophole." *See* 49 Fed. Reg. 794, 835 (1984). When the 1970 amendments were enacted, the Federal Reserve Chairman testified that the modified definition of bank would have only limited effect, possibly confined to a single institution. *See id.* at 834 (letter of Federal Reserve Chairman Burns to Chairman Sparkman of the Senate Banking and Commerce Committee).

Nowhere in the legislative history of the Act's changing definition of "bank" is there the slightest hint that Congress considered the effect of the amendments on the Douglas Amendment, nor is there a hint that Congress conceived that a bank holding company could gain an interstate bank charter without state approval.

the Supreme Court held that the Federal Reserve Board exceeded its delegated authority when it expanded the definition of "bank" contained in the Bank Holding Company Act. The Board had enacted "Regulation Y," to bring so-called "nonbank banks" within its regulatory fold by expanding the statutory definition of "bank" to include institutions that offered the functional equivalent of traditional banking services. The Board defined "demand deposits" to include deposits, like NOW accounts, which are "as a matter of practice" payable on demand, 12 C.F.R. § 225.2(a)(1)(A) (1985), and it defined the "making of a commercial loan" to include "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptance, and similar money market instruments." 12 C.F.R. § 225.2(a)(1)(B) (1985).

The Supreme Court affirmed the Tenth Circuit's invalidation of the Board's amended regulations. It rejected the Board's expanded definition of "demand deposit" as contrary to the Act's express language.[3] It also rejected the Board's expanded definition of "commercial loan" as unsupported by the Act's legislative history.[4]

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[3] The Act defines "bank" to include institutions which "accept[] deposits that the depositor has a legal right to withdraw on demand." 12 U.S.C. § 1841(c). The Board redefined demand deposits to include deposits that were "as a matter of practice" payable on demand. Since the Board's definition conflicted with the statutory language, the Court concluded that the definition was an unreasonable interpretation of the Act. 474 U.S. at ——, 106 S.Ct. at 685-86, 88 L.Ed.2d at 698-99.

[4] The Court declared that "commercial loan substitutes," such as the purchase of retail installment loans, commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments, do not fall within the commonly accepted definition of commercial loans. 474 U.S. at ——, 106 S.Ct. at 686-88, 88 L.Ed.2d at 699-702. The Board's argument to the contrary was undercut by earlier Board decisions distinguishing money market transactions from commercial loans.

Finally, and most significantly for us, the Court rejected the Board's contention that the amended definitions were necessary to preserve the "plain purpose" of the Act. The Court held that the Board's perception of Congress' legislative will must yield to the unambiguous language of the Act. "The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer." 474 U.S. at ——, 106 S.Ct. at 689, 88 L.Ed.2d at 701.

What We Now Say

As we read *Dimension*, our earlier result cannot stand. It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute. 1A Sutherland, Sutherland on Statutory Construction § 20.08 at 88 (4th ed. 1985). Thus, a depository institution which is not a bank as defined in § 1841(c) is similarly not a bank for purposes of the Douglas Amendment, § 1842(d)(1). If it were a bank, we would be faced with the anomaly of "bank" meaning one thing in one section of the Act and another thing in another.

Because U.S. Trust's Florida subsidiary will not make commercial loans, it is not a "bank" within the meaning of the Act. If, as *Dimension* holds, the Federal Reserve Board is without regulatory jurisdiction to regulate nonbank banks as "banks" under the Act, then it is without regulatory jurisdiction to prevent the interstate proliferation of nonbank banks under the Douglas Amendment.

We recognize that, by our holding today, we sanction a result that clearly frustrates the congressional purpose expressed in the Douglas Amendment. *Dimension*, however, ties our hands. When Congress progressively fine-

tuned the definition of "banks" in its 1966 and 1970 amendments to the Bank Holding Company Act, it inadvertently created the opportunity for nonbank banks to spring to life. It is Congress, therefore, that must now decide whether it wishes to shepherd the nonbank banks inside the regulatory pale. "If the Bank Holding Company [Act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts to address." *Dimension*, 474 U.S. at ——, 106 S.Ct. at 689, 88 L.Ed.2d at 702.

The petitioners' challenge to Federal Reserve Board approval of U.S. Trust Corporation's application to charter U.S. Trust Company of Florida is denied.

AFFIRMED.

No. 86-1024 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CONFERENCE OF STATE BANK SUPERVISORS, FLORIDA DEPARTMENT OF BANKING AND FINANCE, FLORIDA BANKERS ASSOCIATION, and SUN BANK/PALM BEACH,

Petitioners,

—against—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM and U.S. TRUST CORPORATION,

Respondents.

MEMORANDUM OF U.S. TRUST CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED

Whether, in light of *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986), the United States Court of Appeals for the Eleventh Circuit correctly decided that an entity that accepts demand deposits but does not make commercial loans is not a "bank" within the meaning of Section 2(c) of the Bank Holding Company Act.

Whether, under *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the United States Court of Appeals for the Eleventh Circuit correctly decided that an entity that is not a "bank," within the meaning of Section 2(c) of the Bank Holding Company Act, is not subject to Section 3(d) (the Douglas Amendment) of the Bank Holding Company Act.

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No. 86-1024

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CONFERENCE OF STATE BANK SUPERVISORS, FLORIDA DEPARTMENT OF BANKING AND FINANCE, FLORIDA BANKERS ASSOCIATION, and SUN BANK/PALM BEACH,

Petitioners,

—against—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM and U.S. TRUST CORPORATION,

Respondents.

MEMORANDUM OF U.S. TRUST CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

U.S Trust Corporation ("U.S. Trust") submits this memorandum in opposition to the petition for a writ of certiorari (the "Petition") filed by the Conference of State Bank Supervisors, the Florida Bankers Association, the Florida Department of Banking and Finance, and Sun Bank/Palm Beach (collectively, "Petitioners").

OPINIONS BELOW

The two opinions of the Eleventh Circuit Court of Appeals in this case are reported as *Florida Department of Banking and Finance v. Board of Governors*, 760 F.2d 1135 (11th Cir. 1985) ("*Florida Department I*") and *Florida Department of Banking and Finance v. Board of Governors*, 800 F.2d 1534 (11th Cir. 1986) ("*Florida Department II*"), and appear in the Appendix to Petitioners' Petition for Writ of Certiorari to the Court of Appeals for the Eleventh Circuit (the "Appendix") beginning at 10a and 46a, respectively. This Court's prior opinion in this case is reported at 106 S. Ct. 875 and appears in the Appendix at 45a.[1] The order of the Federal Reserve Board is reported at 70 Fed. Res. Bull. 371, appears beginning at App. 1a, and is cited herein as "Order, 70 Fed. Res. Bull. at ___ (App. at ___)."

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix to the Petition at pp. 20-21 and are cited herein as "12 U.S.C. ___ § ___ (Pet. at ___)."

STATEMENT OF THE CASE

A. U.S. Trust

U.S. Trust is a New York bank holding company, whose sole bank subsidiary is located in New York, New York. In November 1981, both the Florida Department of Banking and Finance and the Federal Reserve Bank of New York authorized U.S. Trust to establish a Florida nondepository trust subsidiary. Until May 1984, that Florida subsidiary, U.S. Trust Company of Florida, N.A. ("Trust Company"), was operated solely as a nondepository trust company, providing fiduciary, investment advisory and custody services for local customers.

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1 The opinions below and this Court's prior order, as reprinted in the Appendix, are cited herein as "[case citation] (App. at ___)."

B. The Board's Order

On March 23, 1984, the Board of Governors of the Federal Reserve System (the "Board") issued an order, 70 Fed. Res. Bull. 371 (1984) (the "Order"), approving U.S. Trust's application, pursuant to Section 4(c)(8), 12 U.S.C. §1843(c)(8) ("Section 4(c)(8)"), of the Bank Holding Company (the "Act"), to expand Trust Company's nonbanking activities to include the acceptance of time and demand deposits and the making of consumer loans. This approval was subject to conditions which, among other things, prohibited Trust Company from making any commercial loans.[2] The Board ruled that it was required to approve Trust Company's proposed expansion under the Act, which expressly defines a "bank" to be an institution that:

> (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans. . . .

12 U.S.C. § 1841(c) ("Section 2(c)"), cited at App. at 3a.

Because Trust Company would not make commercial loans, the Board concluded that it would not be a "bank" and that U.S. Trust's ownership of Trust Company could not therefore implicate Section 3(d) of the Act, 12 U.S.C. § 3(d) (the "Douglas Amendment"), which regulates interstate "bank" acquisitions. Applying the statutory criteria set forth in Section 4(c)(8) of the Act, the Board concluded that Trust Company's expanded activities would be appropriate non-banking activities and would not result in any "conflicts of interest, unsound banking practices or other adverse effects." 70 Fed. Res. Bull. at 373 (App. at 6a).

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2 Specifically, those conditions were:

> (1) Applicant will not operate Trust Company's demand deposit accepting activities in tandem with any other subsidiary or financial institution;
>
> (2) Applicant will not link in any way the demand deposit and commercial lending services that define a bank under the Act; and
>
> (3) Trust Company will not engage in any transactions with affiliates, other than the payment of dividends to Applicant or the infusion of capital by Applicant into Trust Company, without the Board's approval.

70 Fed. Res. Bull. at 373 (App. at 7a).

After issuance of the Board's Order, U.S. Trust converted Trust Company into a chartered national association. The United States Comptroller of the Currency approved this conversion on the express condition that Trust Company not make commercial loans.

Since May 1984, Trust Company has provided fiduciary, investment advisory, and custody services, and, as authorized by the Board and the Comptroller of the Currency, has taken demand deposit and made non-commercial loans.

C. Prior Decisions of this Court and of the Court of Appeals for the Eleventh Circuit

Petitioners appealed the Board's Order to the Court of Appeals for the Eleventh Circuit. On May 20, 1985, the Court of Appeals issued an opinion reversing the Board's Order. *Florida Department I*. The Court of Appeals concluded that Trust Company should be deemed a "bank" under the Act—even though it did not satisfy the Act's statutory definition of "bank" because it did not make commercial loans.

U.S. Trust thereafter petitioned this Court for a writ of certiorari. This Court granted the petition and vacated the Court of Appeals' ruling. *U.S. Trust Corporation v. Board of Governors*, 106 S. Ct. 875 (1986) (App. at 45a). This Court then remanded the case to the Court of Appeals for reconsideration in light of this Court's opinion in *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 106 S. Ct. 681 (1986) ("*Dimension*").[3]

On remand, the Court of Appeals concluded that it was required by the Supreme Court's decision in *Dimension* to affirm the Order. *Florida Department II*. The Court of Appeals concluded:

> Because U.S. Trust's Florida subsidiary will not make commercial loans, it is not a "bank" within the meaning of the Act. If, as *Dimension* holds, the Federal Reserve Board is without regulatory jurisdiction to regulate

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3 The *Dimension* opinion is reprinted in the Appendix beginning at 30a and is cited herein as "*Dimension*, 106 S. Ct. at ___ (App. at ___)."

> nonbank banks as "banks" under the Act, then it is without regulatory jurisdiction to prevent the interstate proliferation of nonbank banks under the Douglas Amendment.

Florida Department II, 800 F.2d at 1536-37 (App. at 51a).

REASONS FOR DENYING THE WRIT

This Court has already considered and resolved the issues raised by the present Petition. During its 1986 Term, this Court decided *Dimension*, and then reversed and remanded this case to the Eleventh Circuit for reconsideration in light thereof. On remand, in *Florida Department II*, the Eleventh Circuit followed *Dimension* and concluded that U.S. Trust's Florida subsidiary is not a "bank" within the meaning of the Act.

Petitioners presently contend that the Court should again review this case. They argue that Section 3(d) of the Act (the "Douglas Amendment") prohibits U.S. Trust's interstate ownership of Trust Company.

Petitioners are really asking this Court to reconsider issues that it has recently decided. This Court has already held that Congress specifically defined the term "bank" for purposes of the Act and that neither the courts nor the Board can expand that definition to reach an entity that does not make commercial loans. *See Dimension*. This Court has also held, in an opinion the Petitioners do not even cite, that the Douglas Amendment does not apply to an entity that is not a "bank" under the Act. *See Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) ("*Lewis*").

The petition for writ of certiorari should therefore be denied.

I

UNDER THIS COURT'S *DIMENSION* DECISION, TRUST COMPANY IS NOT A "BANK"

Section 2(c) of the Act specifically defines a "bank" to be an entity that:

> (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans . . .

12 U.S.C. § 1841(c) (Pet. at 20). Last term, this Court ordered the Court of Appeals to reconsider this case in light of *Dimension*, in which this Court interpreted the "bank" definition. Upon remand, the Eleventh Circuit correctly concluded that Trust Company is not a "bank."

A. *Dimension* Holds that the Act's "Bank" Definition Cannot Be Expanded By Judicial or Administrative Interpretation

In *Dimension*, this Court's unanimously invalidated regulations[4] by which the Board attempted to extend its authority under the Act to "nonbank banks" — entities that are not within the Act's "bank" definition, but that the Board considered to be the "functional equivalent" of banks. This Court held that Congress had enacted a clear and specific definition of "bank" and that the Board could not rely upon its own view of Congressional "purposes" to expand the definition to include nonbank banks. The Court reasoned that:

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4 The Board had promulgated rules to redefine "bank" to include institutions (i) that accepted deposits payable in demand "as a matter of practice" (rather than by "legal right" as prescribed by the Act) and (ii) that made any loan other than a loan to an individual for personal, family, household or charitable purposes, including "the purchase of retail installment loans or commercial paper, certificates of deposit, bankers' acceptances, and similar money market instruments" (rather than "commercial loans" prescribed by the Act). 12 C.F.R. § 225.2(a)(1)(1985).

> The statute by its terms . . . exempts from regulation *all* institutions that do not engage in the business of making commercial loans. The choice of this . . . language demonstrates that . . . Congress intended to exempt the class of institutions not making commercial loans. Furthermore, the legislative history supports this plain reading of the statute.

106 S. Ct. at 687 (App. at 40a) (emphasis in original).

This Court's *Dimension* opinion concluded that the Congressional purpose behind the Act had to be determined in the first instance "with reference to the plain language of the statute itself." 106 S. Ct. at 688-89 (App. at 42a). Indeed, this Court concluded that:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, *the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.*

106 S. Ct. at 689 (App. at 42a-43a) (emphasis added).[5]

B. Under *Dimension*, the "Bank" Definition Determines the Scope of all Provisions of the Act

Despite the Court's unequivocal holding in *Dimension*, Petitioners now argue that the statutory "bank" definition cannot apply to

5 By contrast, in *Cass v. United States*, 417 U.S. 72 (1974), a case cited by Petitioners, the Court looked to the legislative history of 10 U.S.C. § 687(a) because it found the statutory language to be ambiguous.

the Douglas Amendment because such application would defeat Congress's purpose in enacting that Amendment. They argue that the term "bank" or, alternatively, the term "additional bank" must therefore have a different meaning for purposes of the Douglas Amendment. However, as the *Dimension* opinion expressly concludes, Congress's "bank" definition was specifically intended to determine the scope of the entire Act — including, of course, the Douglas Amendment.

The Act's "bank" definition clearly applies to the entire Act, including the Douglas Amendment.[6] In 1970, Congress amended the definition to include only depository entities that make commercial loans. In *Dimension*, the Court reviewed the legislative history of this amendment and concluded that it was intended to have general applicability and to narrow the scope of the entire Act.[7] The Court wrote:

> The statute by its terms . . . exempts from regulation *all* institutions that do not engage in the business of making commercial loans. The choice of this general language demonstrates that, although the legislation may have been prompted by the needs of one institution, *Congress intended to exempt the class of institutions not making commercial loans*. Furthermore, the legislative history supports this plain reading of the statute.

106 S. Ct. at 687 (App. at 40a) (emphasis added).

General rules of statutory construction also support this conclusion. As the Eleventh Circuit itself reasoned in its opinion on remand in this case:

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6 The "bank" definition appears in the definitions section at the beginning of Chapter 17 of Title 12 of the United States Code. That section is obviously intended to provide the definitions for the Act, including the Douglas Amendment.

7 The Board had argued that this amendment was a technical amendment intended to exclude only one institution (the Boston Safe Deposit & Trust Co.) from the Act. The Court rejected this argument, which it called a "revisionist view of the purpose of the 'commercial loan' provision. . . ." 106 S. Ct. at 687 (App. at 40a).

> It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute. 1A Sutherland, Sutherland on Statutory Construction § 20.08 at 88 (4th ed. 1985). Thus, a depository institution which is not a bank as defined in § 1841(c) is similarly not a bank for purposes of the Douglas Amendment, § 1842(d)(1). *If it were a bank, we would be faced with the anomaly of "bank" meaning one thing in one section of the Act and another thing in another.*

Florida Department II, 800 F.2d at 1536 (App. at 51a) (emphasis added).

In support of their argument, Petitioners cite *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932) (Petition at 9), as an instance in which this Court has interpreted the same term to have different meanings in different provisions of the same statute. In *Atlantic Cleaners*, the Court interpreted the term "trade or commerce" as used in the Sherman Antitrust Act. The Sherman Act, however, contained no statutory definition of "trade or commerce." Thus, the Court was not presented with a specific definition enacted by Congress. By contrast, Congress did include a very specific "bank" definition in the Bank Holding Company Act[8]

In addition, in *Atlantic Cleaners*, the Court only held that the term "trade or commerce" had a broader meaning for the purposes of Section 3 of the Sherman Act than for the purposes of Section 1. The Court based this holding on its conclusion that, in passing Sections 1 and 3, Congress had intended to exercise all the power it possessed and that Congress had been delegated broader powers to regulate interstate commerce (governed by Section 3) than to regulate commerce involving the District of Columbia, a Territory, or a foreign nation (governed by Section 1). The Court reasoned that "in

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8 Similarly, in two other cases cited by Petitioners, the term at issue was not defined in any statutory provision. *See District of Columbia v. Carter*, 409 U.S. 418 (1973); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84 (1934).

passing § 1, Congress could exercise only the power conferred by the commerce clause; but, in passing § 3, it had unlimited power, except as restricted by other provisions of the Constitution." 286 U.S. at 435.[9] This distinction is not applicable to the present case.

In the present case, Congress enacted a single "bank" definition to determine the scope of the Act and did not rely on different delegated powers in enacting that definition and the Douglas Amendment. As the term "bank" was correctly interpreted by this Court in *Dimension*, U.S. Trust's Florida subsidiary is simply not a "bank" and is therefore not subject to the Douglas Amendment.

C. *Dimension* Holds That Only Congress Can Modify the "Bank" Definition

In *Dimension*, the Court concluded that, because Congress had enacted a specific definition of "bank", only Congress could change that definition. Chief Justice Burger wrote:

> [i]f the Bank Holding Company [Act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.

106 S. Ct. at 689 (App. at 43a-44a). Recognizing the validity of this holding, the Eleventh Circuit concluded that "[i]t is Congress . . . that must now decide whether it wishes to shepherd the nonbank banks inside the regulatory pale." *Florida Department II*, 800 F.2d at 1537 (App. at 52a).[10]

9 Petitioners also mistakenly cite *District of Columbia v. Carter*, 409 U.S. 418 (1973), in which the Court held that the District of Columbia is included within "every State and Territory" as employed in 42 U.S.C. § 1982, but is not a "State or Territory" for the purposes of 42 U.S.C. § 1983. As in *Atlantic Cleaners*, the two statutory provisions were passed pursuant to different powers which have been constitutionally delegated to Congress. Indeed, Section 1982 was passed to implement the Thirteenth Amendment's absolute bar to all racial discrimination, whereas Section 1983 was passed pursuant to the Fourteenth Amendment's prohibition against deprivations of rights by the States.

10 The subsequent history of a case cited by petitioners, *Farmers Resevoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949), also illustrates Congress's power to change statutory language, if it wishes. After the Court held that the employees of a mutual irrigation company were not exempted from the Fair Labor

In fact, legislation which would redefine "bank" for the purposes of the Act has been introduced in Congress (but ultimately not enacted) every year since 1983. *See, e.g.*, H.R. 20, 99th Cong., 1st Sess. (1985); H.R. 5916, 98th Cong., 2d Sess. (1984); S. 2181, 98th Cong., 1st Sess. (1983). Indeed, such legislation is presently before the Senate. S. 790, 100th Cong., 1st Sess. § 101(a) (1986).

II

PETITIONERS DISTORT LEGISLATIVE HISTORY IN AN ATTEMPT TO AVOID THE *DIMENSION* DECISION

To avoid the *Dimension* decision, Petitioners argue that the legislative histories of the Douglas Amendment and the McFadden Act (a statute with no application to this case[11]) indicate that a bank holding company should not be permitted to own a deposit-taking nonbank bank in a second state. Petitioners simply ignore the *relevant* legislative history—that of the Act's "bank" definition. Having fully considered the legislative history of Section 2(c) in *Dimension*, the Court concluded that it clearly shows that Congress did not intend to regulate an entity as a "bank" unless it both receives demand deposits *and* makes commercial loans.

Footnote 10 continues:

Standards Act (the "FLS Act"), Congress amended the FLS Act to reflect its intention to exempt such persons from the Act. *See* 29 U.S.C. § 213(a)(6). *See also* 29 U.S.C. § 251(a) ("The Congress hereby finds that the [FLS Act] has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers . . .").

11 The McFadden Act, 12 U.S.C. § 36, is not at issue here. It regulates branch-banking by a single bank.

As originally enacted in 1956, Section 2(c) of the Act defined a "bank" to be any institution with a federal or state banking charter. 106 S. Ct. at 684. After the proposed Act had been reported out of the Senate and House Banking and Currency Committees, Senator Douglas introduced the Douglas Amendment. That Amendment principally reflected Congress' concern with preventing the development of any monopoly over commercial lending. Senator Douglas's remarks, which constitute the principal legislative history of the Douglas Amendment,[12] show that Congress enacted the amendment to avoid the monopolization of commercial credit that it perceived to have developed in Britain, Germany and other European countries as a result of a few banks' abilities to allocate commercial credit.[13]

In his remarks about the Douglas Amendment, Senator Douglas expressed no concern for depository institutions that did not make commercial loans. He certainly did not propose that "bank" have a different meaning for the Douglas Amendment than for other provisions of the Act.

In 1956, Congress knew that some existing institutions that took deposits—"industrial" banks (also known as "Morris Plan" banks)[14]—did not make commercial loans. The 1956 legislative his-

12 As this Court held in *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 169-70 (1985):

> [The Douglas Amendment's] entire legislative history is confined to the Senate debate. In such circumstances, the comments of individual legislators carry substantial weight, especially when they reflect a consensus as to the meaning and objectives of the proposed legislation though not necessarily the wisdom of that legislation.

13 102 Cong. Rec. 6857 (1956) (for instance, Douglas stated, "[f]or he who controls the credit of a country controls the industry of that country and, ultimately, the political life of the Nation as well"). In addition, Senator Douglas expressed concern that such a monopoly over commercial credit might, as it had in Britain and Germany, allow nonbanking entities that were affiliated with banks to develop unfair commercial advantages because they had substantially greater access to commercial loans than their competitors had. *Id.*

14 These industrial or Morris Plan banks made consumer, but not commercial loans. They also received deposits in a number of forms determined by state law. *See generally* American Financial Services Association, Industrial Banks as Thrift Institutions (1983).

tory shows that Congress did not intend these institutions to be within the scope of the Act's definition of "bank" or to be governed by the Douglas Amendment. *E.g.*, 102 Cong. Rec. 6957 (1956) (statement of Sen. Robertson); 101 Cong. Rec. 3823 (1955) (statement of Rep. Spence). *See also Applicability of the Bank Holding Company Act to Industrial Banks*, 49 Fed. Res. Bull. 166 (1963). Indeed, in 1956, Congress was aware of instances in which industrial banks were owned on an interstate basis.[15] In sum, this 1956 legislative history shows that Congress did not intend the Douglas Amendment to govern the interstate ownership of all depository institutions.

In 1966, Congress concluded that the Act's "bank" definition was too broad. Congress amended the definition to regulate only institutions that "accept deposits that the depositor has a legal right to withdraw on demand."[16] The Court concluded in *Dimension* that

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15 *Bank Holding Legislation: Hearings on S.76 and S.1118 Before the Senate Comm. on Banking and Currency*, 83rd Cong., 1st Sess. 328-33 (1953) (statement of E. Huntington, President, Morris Plan Corp. of America) (Financial General Corporation, the parent company of the "Morris Plan System," had a controlling interest in 18 industrial banks in various cities throughout the country); *id.* at 631-55 (statement of Walter S. Burtelow, Exec. Vice President, General Contract Corp.) (General Contract Corp. of St. Louis had controlling interest in industrial banks located in at least 3 states); R.J. Saulnier, *Industrial Banking Companies and Their Credit Practices*, 13, 23-25 (1940).

16 Arguing from the absence of any evidence one way or the other as to whether Congress intended the Douglas Amendment to be affected by the 1970 amendments, Petitioners essentially contend that this Court should ignore that amendment to Section 2(c). Petitioners base their argument on their observation that Congress intended its 1966 amendment of the "bank" definition to confirm that all deposit-taking institutions would be subject to the Douglas Amendment. (Petition at 18). As Petitioners correctly point out, *id.*, however, the Senate Committee report on the 1970 amendments stated that the amendments to Section 2(c) would "exclude institutions that are not engaged in the business of making commercial loans from the definition of 'bank.' " S. Rep. No. 1084, 91st Cong., 2d Sess. 24 (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 5519 at 5541, *quoted in Dimension*, 106 S. Ct. at 687-88 (App. at 41a).

this amendment was intended to limit the scope of the Act.[17] *See* 106 S. Ct. at 685 (App. at 36a).

By the late 1960's, a large number of one-bank bank holding companies (not then subject to the Act) had developed. In 1970, Congress amended the Act to include these one-bank holding companies.[18] This amendment significantly expanded the number of regulated bank holding companies within the Act.

As a part of its 1970 amendments to the Act, Congress narrowed the "bank" definition to exclude institutions that did not make commercial loans. This narrowing was intended to exclude institutions that did not present the type of harm (the undue control of commercial lending) that concerned Congress.[19] In *Dimension*, this Court concluded that this 1970 amendment was intended to limit the Act's scope to commercial lenders. The Court stated:

> The 1966 definition proved unsatisfactory because it too included within the definition of "bank" institutions that did not pose significant dangers to the banking system. Because one of the primary purposes of the Act was to "restrain undue concentration of . . . commercial credit," it made little sense to regulate institutions that did not, in fact, engage in the business of making com-

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17 *See e.g.*, S. Rep. No. 1179, 89th Cong., 2d Sess. 7, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2385, 2391. ("The purpose of the [A]ct was to restrain undue concentration of control of commercial bank credit, and to prevent abuse by a holding company of its control over this type of credit for the benefit of its nonbanking subsidiaries").

18 *E.g.*, *Hearings on H.R. 6778 Before the House Comm. on Banking and Currency*, 91st Cong., 1st Sess. 200-01 (1969) (comments of William McChesney Martin, Jr., Chairman, Board of Governors Federal Reserve System); *id.* at 196-97 (comments of William McChesney Martin, Jr., Chairman, Board of Governors, Federal Reserve System), *quoted in* S. Rep. No. 1084, 91st Cong., 2d Sess. 3, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5519, 5521-22.

19 *See*, S. Rep. No. 1084, 91st Cong., 2d Sess. 24, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5519, 5541 (the 1970 amendments to the bank definition were intended to implement Congress's 1966 intent to exclude those "institutions not engaged in commercial banking, since the purpose of the act was to restrain undue concentration of commercial banking resources and to prevent possible abuses related to the control of commercial credit").

> mercial loans. *Congress accordingly amended the definition, excluding all institutions that did not "engag[e] in the business of making commercial loans."*

106 S. Ct. at 685 (App. at 34a) (emphasis added; citations omitted).

III

THIS COURT HAS HELD THAT THE DOUGLAS AMENDMENT GOVERNS ONLY "BANK" ACQUISITIONS

Petitioners argue alternatively (i) that, despite *Dimension*, the term "bank" somehow has a different meaning for the Douglas Amendment than for the rest of the Act or (ii) that the threshold term for the Douglas Amendment is "additional bank" rather than "bank." Petitioners make both of these arguments without even citing this Court's *Lewis* decision. In *Lewis*, this Court held that the Douglas Amendment governs only "bank" acquisitions and rejected the argument that the Douglas Amendment regulated nonbanking activities.[20]

In *Lewis*, the Court held unconstitutional two Florida statutes that sought to prohibit out-of-state bank holding companies from owning nonbanking entities in Florida.[21] The Court concluded that the Act preempted Florida from prohibiting the interstate acquisition of a nonbank entity. The Court specifically held that the Douglas Amendment did not apply to such nonbank entities, stating:

> . . .the structure of the Act reveals that § 3(d) applies only to holding company acquisitions of *banks*. Nonbanking activities are regulated separately in § 4,

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20 Petitioners' failure to cite *Lewis* is particularly unjustifiable given that two of them — Florida Bankers Association and Conference of State Board Supervisors — appeared *amicus curiae* in *Lewis*, 447 U.S. at 29 n, and the counsel representing the Conference of State Board Supervisors here argued the case to the Court, id. at 29.

21 In *Lewis*, a New York bank holding company provided investment advisory services in Florida pursuant to the same statutory provision (Section 4(c)(8)) under which the Board of Governors of the Federal Reserve System approved the nonbanking activities of Trust Company which are at issue here.

> which does not contain a parallel provision. Even if § 3(d) could be interpreted to authorize additional state regulation, ordinary canons of interpretation thus would lead to the inference that restraints so authorized could apply only to a holding company's *banking* activities.

447 U.S. at 47 (emphasis added; footnote omitted).

Conclusion

For the above reasons, U.S. Trust respectfully submits that this Court should deny the petition for a writ of certiori of the Conference of State Bank Supervisors, Florida Department of Banking and Finance, and the Sun Bank/Palm Beach.

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March 27, 1987

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I HEREBY CERTIFY that true copies of the foregoing Memorandum of U.S. Trust Corporation have been served by Federal Express, on this 27th day of March, 1987, to:

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No. 86-1024

In the Supreme Court of the United States

OCTOBER TERM, 1986

CONFERENCE OF STATE BANK SUPERVISORS, ET AL., PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an institution that takes deposits but does not make commercial loans is a "bank" within the meaning of Section 3(d) of the Bank Holding Company Act, 12 U.S.C. 1842(d).

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 10a-29a, 46a-52a) are reported at 760 F.2d 1135 and 800 F.2d 1534, respectively. The order of the Board of Governors of the Federal Reserve System (Pet. App. 1a-9a) is reported at 70 Fed. Res. Bull. 371.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1986. The petition for a writ of certiorari was filed on December 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(c) of the Bank Holding Company Act of 1956 (BHCA or Act) (12 U.S.C. 1841(c)) defines "bank" to mean "any institution * * * which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." The term "bank holding company," in turn, is defined to "mean[] any company which has control over any bank" (12 U.S.C. 1841(a)(1)). The BHCA subjects such companies to extensive regulation. Among other things, Section 3(d) of the Act (12 U.S.C. 1842(d))—commonly known as the Douglas Amendment—prohibits a bank holding company that has its principal place of business in one state from acquiring a bank located in another state, unless the acquisition "is specifically authorized by the statute laws of the State in which such bank is located." In addition, Section 4 of the BHCA (12 U.S.C. 1843) generally prohibits bank holding companies from engaging in nonbanking activities, although Section 4(c)(8), 12 U.S.C. 1843(c)(8), permits such companies to conduct activities that are deemed by the Federal Reserve Board "to be so closely related to banking * * * as to be a proper incident thereto."

Respondent U.S. Trust Corporation (U.S. Trust) is a bank holding company located in New York. Since 1981, U.S. Trust has owned a nondepository

trust company subsidiary in Florida. In 1983, U.S. Trust sought the Board's approval, pursuant to Section 4(c)(8) of the BHCA, to expand its Florida subsidiary's "non-bank" activities to include the acceptance of demand deposits and the making of consumer—but not commercial—loans. The Board granted the application, explaining that since the subsidiary would not make commercial loans it would "not be a bank within the meaning of the Bank Holding Company Act" (Pet. App. 4a). For that reason, the Board continued, U.S. Trust's proposal did not run afoul of the Douglas Amendment: "In this situation, where the applicant will not make commercial loans in Florida * * * the Board does not have the discretion to find that the proposal falls within the prohibitions on interstate acquisitions contained in section 3(d) of the Act, which only applies to the acquisition of banks as defined in section 2(c) of the Act" (*ibid.* (citation omitted)).

Petitioners, who contested the U.S. Trust application before the Board, sought review of the Board's order in the court of appeals, arguing that the Florida subsidiary was subject to the Act's limitations on interstate banking despite its failure to satisfy the BHCA's two-part definition of a "bank." The court of appeals agreed (Pet. App. 10a-29a), eschewing "[l]iteralism in statutory interpretation" as, in this case, "contrary to an express purpose of the Act" (*id.* at 17a). The court first expressed its view that the commercial lending prong was added to the Act's definition of "bank" as a "technical amendment" that had been intended to affect only a single institution (*id.* at 24a). Against this background, the court concluded that a literal application of the definition would "destroy the important federal policy embodied

in the Douglas Amendment—a federal policy which allows the state to choose for itself whether to open its borders to out-of-state banks" (*id.* at 27a). The court therefore held that the Board should have denied the U.S. Trust application under Section 5(b) of the BHCA (12 U.S.C. 1844(b)), which authorizes Board action to "prevent evasions" of the Act (Pet. App. 27a-29a). U.S. Trust sought certiorari from this ruling.

2. While U.S. Trust's petition for certiorari was pending, this Court decided *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986). In *Dimension*, the Court invalidated a Board regulation that broadly defined the term "bank" for purposes of the BHCA. The regulation had read the "demand deposit" portion of the Section 2(c) definition of "bank" to include any deposit that is payable on demand as a matter of practice, even if not as a matter of legal right; it had also read Section 2(c)'s reference to "making commercial loans" to include the purchase of certain money market instruments. See slip op. 2 (citing 12 C.F.R. 225.2(a)(1) (1985)). The Court held that the regulation was inconsistent with the statutory definition of the term "bank" (slip op. 3-11). In particular, the Court rejected the contention that the "commercial loan" portion of the Section 2(c) definition had been intended to affect only one institution, holding that "[t]he statute by its terms * * * exempts from regulation [under the BHCA] *all* institutions that do not engage in the business of making commercial loans" (slip op. 9-10 (emphasis in original)).

The Court also rejected the argument that its reading of the statute was inconsistent with the purposes of the BHCA. The Court explained that "[t]he

'plain purpose' of legislation * * * is determined in the first instance with reference to the plain language of the statute itself" (slip op. 12). And the Court noted that, "[if] the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress" (*id.* at 13).

The Court subsequently granted U.S. Trust's petition for certiorari in this case, vacated the judgment of the court of appeals, and remanded the case for reconsideration in light of *Dimension* (Pet. App. 45a).

3. On remand, the court of appeals affirmed the Board's order (Pet. App. 46a-52a), explaining that *Dimension* "squarely rejects the reasoning behind [the] vacated opinion" (*id.* at 47a). The court of appeals found it "an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute. Thus, a depository institution which is not a bank as defined in § 1841(c) is similarly not a bank for purposes of the Douglas Amendment" (*id.* at 51a (citation omitted)). The court added that "[i]f, as *Dimension* holds, the Federal Reserve Board is without regulatory jurisdiction to regulate nonbank banks as 'banks' under the Act, then it is without regulatory jurisdiction to prevent the interstate proliferation of nonbank banks under the Douglas Amendment" (*ibid.*). While the court expressed concern that this result might frustrate the BHCA's purposes, it added that Congress has the responsibility to decide "whether it wishes to shepherd the nonbank banks inside the regulatory pale" (*id.* at 52a).

ARGUMENT

Petitioners appear to acknowledge that U.S. Trust's Florida subsidiary is not a "bank" within the meaning of Section 2(c) of the Act, the BHCA's definitional provision. Given this Court's holding in *Board of Governors* v. *Dimension Financial Corp., supra*, petitioners could hardly contend otherwise. They argue, however, that the statutory definition of "bank" does not govern the use of that term in the Douglas Amendment; instead, they maintain that the Douglas Amendment's restriction on the interstate acquisition of "additional bank[s]" by bank holding companies is applicable even to deposit-taking institutions that do not make commercial loans and that, therefore, are not "banks" as defined in Section 2(c) of the Act. This contention, which has now been addressed (and rejected) only by a single court of appeals, is entirely without merit and does not warrant this Court's consideration.

1. When Congress defines a statutory term with precision, it generally is presumed that the definition controls the meaning of the term wherever it appears in the statute. See generally *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 13-15; *Colautti* v. *Franklin*, 439 U.S. 379, 392 n.10 (1979); *Atlantic Cleaners & Dryers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932). Here, Section 2(c) of the BHCA provides without limitation that " '[b]ank' means any institution" that accepts demand deposits and makes commercial loans. By putting the definition in this form and by placing it at the beginning of 12 U.S.C. Chapter 17 (which includes the BHCA), Congress plainly intended Section 2(c)'s definition to control throughout the BHCA, so that all of the Act's limitations on the ownership and acquisition of banks

apply only to institutions that meet Section 2(c)'s two-pronged test. And as petitioners obliquely acknowledge (see Pet. 16-19), there is no indication in the legislative history of the BHCA that Congress intended a different, unwritten definition to apply to the term "bank" as it appears in the Douglas Amendment.[1]

The statutory structure confirms that the Section 2(c) definition of "bank" must apply to the use of that term in Section 3(d). Section 3(a) of the Act (12 U.S.C. 1842(a)) requires Board approval prior to the acquisition of a "bank." Section 3(d)—the Douglas Amendment—operates by prohibiting the Board from approving an interstate acquisition of a "bank" unless the acquisition is authorized by state statute. Thus, the Douglas Amendment's restrictions on interstate banking apply only to the acquisition of

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[1] Petitioners cite a number of cases (Pet. 9-11) for the unsurprising proposition that the same term may be given different meanings in different portions of a statute if that plainly is Congress's intent. In each of the cases cited by petitioners, however, there were compelling indications in the statutory background that Congress intended such a reading of the statute. See, *e.g.*, *Cass* v. *United States*, 417 U.S. 72, 76-84 (1974); *Atlantic Cleaners & Dryers*, 286 U.S. at 435. There is no such evidence here. Petitioners attempt to put the best face on this lack of support for their contentions, stating that "there is no evidence to suggest that Congress intended the Douglas Amendment to be affected in any way by the 1970 amendment to Section 2(c) [which added the commercial lending prong to the definition of 'bank']" (Pet. 18 (footnote omitted)). But since the Douglas Amendment was part of the BHCA when the definition was modified and the definition appears on its face to apply to the entire BHCA, it surely is petitioners' obligation to offer specific evidence that Congress wanted to limit the applicability of the provision.

"banks" for which the Board's prior approval is required under Section 3(a); the interstate acquisition of nonbanking entities, which is governed by Section 4, is not subject to the Douglas Amendment's restrictions. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980). In these circumstances, it would be nonsensical to give the term "bank" different meanings in Section 3(a) and (d).

2. Even if it were somehow reconcilable with the statutory language, petitioners' reading of the BHCA is foreclosed by *Dimension*. The Board regulation at issue in that case provided a definition of "bank" that applied to all portions of the BHCA, including the Douglas Amendment. The Board's analysis was thus premised on the understanding that the definition of "bank" in Section 2(c) dictates the meaning of that term wherever it appears in any of the BHCA's provisions. Indeed, in promulgating the regulation the Board explained that its interpretation of "bank" was intended to preserve, among other things, the ban on interstate bank acquisitions imposed by the Douglas Amendment (49 Fed. Reg. 836 (1984)); the interstate effects of a decision setting aside the regulation were stressed by the Board in its brief to this Court in *Dimension* (84-1274 Pet. Br. 12, 24), and the Board's concerns were acknowledged by this Court in its decision (slip op. 5). The Court, however, made no suggestion that the Board has greater authority to regulate the acquisition of "nonbank banks" by bank holding companies under the Douglas Amendment than it has under other provisions of the BHCA. To the contrary, the Court stated flatly that institutions that do not engage in commercial lending (and are therefore not "banks" within

the meaning of Section 2(c)) are "exempt from regulation" under the Act (slip op. 9).[2]

Petitioners have offered no reason for the court to revisit this issue. They contend principally (Pet. 6-8) that the decision below is inconsistent with the policy against interstate banking that they believe to underlie the BHCA; they also assert (Pet. 18-19) that a 1970 amendment of Section 2(c), which added the "commercial loan" prong to the definition of "bank" (see Pub. L. No. 91-607, § 101(c), 84 Stat. 1762), was intended to exclude only a single institution from regulation under the Act. The Court, however, expressly rejected identical contentions in *Dimension*. See slip op. 9-10, 12.[3] That is enough to dispose of petitioners' claims.

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[2] Petitioners attempt to distinguish *Dimension* by arguing that their reading of the Act would bring the Douglas Amendment into play only when a "nonbank bank"—an institution that is outside the Section 2(c) definition because it either does not offer demand deposits or does not make commercial loans—is acquired by a bank holding company that is already subject to regulation by the Board; in contrast, petitioners continue, the Board regulation at issue in *Dimension* would have converted any company that owned a nonbank bank into a bank holding company (if that nonbank bank fell within the Board's regulatory definition of "bank") (Pet. 11-13). While this is true, it is entirely beside the point. The Court's decision in *Dimension* turned on its reading of Section 2(c), not on the regulated (or unregulated) status of the entities affected by the Board's regulation. Indeed, petitioners' reading would create an irrational distinction by permitting institutions that are not bank holding companies to, in petitioners' words, "acquire deposit-taking banks across state lines" (Pet. 6); it would prevent bank holding companies from doing the same thing.

[3] Petitioners place great weight on the fact that the 1970 amendment's legislative history does not expressly mention

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the Douglas Amendment (Pet. 18-19). In fact, however, the legislative history does not expressly mention *any* provision of the BHCA; it simply speaks generally of "exclud[ing] institutions that are not engaged in the business of making commercial loans from the definition of bank." S. Rep. 91-1084, 91st Cong., 2d Sess. 24 (1970).

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No. 86-1024

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CONFERENCE OF STATE BANK SUPERVISORS,
FLORIDA DEPARTMENT OF BANKING AND FINANCE,
FLORIDA BANKERS ASSOCIATION AND
SUN BANK/PALM BEACH,
Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
and U.S. TRUST CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONERS

Respondents, Board of Governors of the Federal Reserve System ("Board") and U.S. Trust Corporation ("U.S. Trust") have raised three basic arguments in opposition to the Petition. Each of these contentions is without merit.

1. Respondents first say that the issue is controlled by this Court's decision in *Board of Governors v. Dimension Financial Corp.*, 106 S. Ct. 681 (1986) (*"Dimension"*).[1] However, as Petitioners already have shown,[2]

[1] Brief of the Board ("Board Br.") at 8-9; Memorandum of U.S. Trust ("U.S. Trust Br.") at 6-11.

[2] Petition for Certiorari ("Pet.") at 11-12.

this Court did *not* decide in *Dimension* the issue presented in this case—namely, whether a *regulated* bank holding company, which already owns at least one "bank" as defined in Section 2(c) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. §§ 1841 *et seq.* ("BHC Act"), may acquire an *additional* deposit-taking, chartered bank across state lines without complying with Section 3(d) of the BHC Act (the "Douglas Amendment"). This Court did not specifically refer to the Douglas Amendment in *Dimension*.[3] Moreover, it is of particular significance that the Tenth Circuit Court of Appeals *expressly declined* in *Dimension* to consider the Douglas Amendment:

> [N]or do we feel it necessary to discuss the Douglas Amendment although it is a significant factor in the mix of state and federal regulation.

Dimension Financial Corp. v. Board of Governors, 744 F.2d 1402, 1410 (10th Cir. 1984), *aff'd* 106 S. Ct. 681 (1986). The issue presented in this case thus was not even before this Court when it decided *Dimension*.[4]

2. Respondents also suggest that *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) ("*BT Investment*"), supports their claim that a chartered, deposit-taking bank is not an "additional bank" for purposes of the Douglas Amendment.[5] *BT Investment*, however, provides no authority for Respondents' position.

In *BT Investment*, this Court struck down a state statute that prohibited out-of-state bank holding companies from establishing *nonbanking* subsidiaries providing investment advisory services. This Court concluded

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[3] *See id.* at 12 n.27.

[4] Indeed, the Board itself appears to recognize that this issue was not decided by this Court in *Dimension* since the Board states that this issue "has now been addressed only by a single court of appeals . . . ." Board Br. 6.

[5] U.S. Trust Br. 15-16; Board Br. 7-8.

that the Douglas Amendment did not apply to such subsidiaries, which neither were chartered as banks nor provided *any* banking services. The result in *BT Investment* is clearly distinguishable from this case, where U.S. Trust has established an out-of-state subsidiary which is chartered as a national *bank* and provides *banking* services, including the acceptance of demand deposits and savings accounts and the making of consumer loans.

Thus, *BT Investment* held that the Douglas Amendment did not apply to a *non*-banking entity, and that it only applies to banking institutions. Respondents agree. Therefore, the issue here is whether U.S. Trust's banking subsidiary in Florida *is* an "additional bank" for purposes of the Douglas Amendment.

Indeed, this Court's opinion in *BT Investment* supports Petitioner's contention that the Douglas Amendment *does* apply to U.S. Trust's subsidiary bank in Florida. In *BT Investment*, this Court stated that the Douglas Amendment was intended to prohibit bank holding companies, absent state authorization, from "expanding into *banking* across state lines." 447 U.S. at 47 (emphasis added). This Court also pointed out that the Douglas Amendment was designed to prevent bank holding companies from using the holding company device as a means to evade the prohibition in the McFadden Act of 1927, as amended (12 U.S.C. § 36), against interstate branching by national banks. *Id. Accord, Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 169-72 (1985). As Petitioners have shown (*see* Pet. 15-16), the McFadden Act would *not* permit U.S. Trust to establish a national bank in New York with a Florida branch that provides the *banking* services now being offered by U.S. Trust's national bank in Florida. Accordingly, U.S. Trust's Florida bank plainly violates the Douglas Amendment as construed in both *BT Investment* and *Northeast Bancorp*.

3. Respondents finally contend that the legislative history of the BHC Act is consistent with their claim that

the definition of "bank" in Section *2(c)* must be applied automatically to the term "additional bank" in Section *3(d)*, the Douglas Amendment.[6]

Significantly, the Board *concedes*, based upon the cases cited by Petitioners, that the term "additional bank" in the Douglas Amendment could properly be given a meaning *different* from the definition of "bank" in Section 2(c) "if that plainly is Congress' intent."[7] This concession is of critical importance, because the pertinent legislative history demonstrates that Congress did *not* intend to alter the meaning of the term "additional bank" in the Douglas Amendment when it *did* change the definition of "bank" under Section 2(c) in 1970.

Petitioners have shown (*see* Pet. 14-16) that both the Douglas Amendment *and* Section 2(c), as originally enacted in 1956, applied to *all* chartered national and state banks. The prohibition in the Douglas Amendment against interstate acquisitions of deposit-taking banks, absent state authorization, reflected Congress' recognition that (i) deposits provide banks with their primary resource for extending credit and making investments, and (ii) state control over the acquisition of deposit-taking banks would accordingly be necessary to ensure a decentralized, unconcentrated banking system responsive to local consumer and business needs.[8]

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[6] Board Br. 7, 9; U.S. Trust Br. 11-15.

[7] Board Br. 7 n.1, citing *Cass v. United States*, 417 U.S. 72, 76-84 (1974); *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 435 (1932). The Board's concession confirms the error of the court below in holding that the definition of "bank" in Section 2(c) *must* be applied to the Douglas Amendment *regardless* of congressional intent. *Florida Dept. of Banking and Finance v. Board of Governors*, 800 F.2d 1534, 1536 (1986), Pet. Appendix ("App.") 51a-52a.

[8] *See* Pet. 16 n.35, and the authorities cited therein. U.S. Trust asserts (U.S. Trust Br. 12-13) that the Douglas Amendment did not apply to *all* deposit-taking banks in 1956 since the "Morris Plan"

In 1966, Congress strengthened the Douglas Amendment and amended the definition of "bank" in Section 2(c) to include all institutions that accepted demand deposits.[9] Respondents have not disputed that U.S. Trust's Florida bank would have been both a "bank" under Section 2(c) *and* an "additional bank" under the Douglas Amendment as both statutes were revised in 1966.

Thus, the sole issue to be resolved in this case is whether Congress intended that the meaning of "additional bank" in the Douglas Amendment would be narrowed in 1970, when Congress amended the definition of "bank" in Section 2(c) by adding the commercial loan test. Significantly, Respondents do not dispute the explicit findings of the Board and the court below that the automatic application of the 1970 amendment to Section 2(c) would "undermin[e]" and "destroy" the original purpose of the Douglas Amendment.[10] Moreover, Respondents do not contest that (as the court below held in *both* of its

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industrial banks were exempted from the 1956 BHC Act. U.S. Trust ignores the fact that the Morris Plan Corp. and its banks were excluded *only* because their parent holding company, Equity Corp., was expressly exempted under Section 2(a)(B) of the 1956 BHC Act, due to Equity Corp.'s status as a registered investment company. Act of May 9, 1956, ch. 240, § 2(a)(B), 70 Stat. 133. But for the specific exclusion of Equity Corp., the Morris Plan industrial banks *would* have been "banks" for purposes of Section 2(c) and the Douglas Amendment (as, indeed, *other* industrial banks *were* treated as "banks") if they accepted deposits similar to those taken by commercial banks. 102 Cong. Rec. 6942, 6948, 6950-51 (1956) (remarks of Sen. Morse); *id.* at 6957 (colloquy between Sen. Martin and Sen. Robertson); *id.* at 6963 (statement by Sen. Capehart). *See Applicability of Bank Holding Company Act to Industrial Banks*, 49 Fed. Res. Bull. 165, 166 (1963).

[9] *See* Pet. 16-17.

[10] *U. S. Trust Corp.*, 70 Fed. Res. Bull. 371, 372, 373 (1984), App. 3a, 6a; *Florida Dept. of Banking and Finance v. Board of Governors*, 760 F.2d 1135, 1141 (1985), App. 23a. *See also* Board Br. at 3-4, 5.

opinions) there is no evidence to suggest that Congress intended the 1970 amendment to Section 2(c) to affect the existing scope of the prohibition contained in the Douglas Amendment.[11]

In the face of this congressional silence as to the effect of the 1970 amendment to Section 2(c) upon the Douglas Amendment, the Board argues (Board Br. 7 n.1) that it is Petitioners' "obligation to offer specific evidence" that Congress did *not* intend to change the Douglas Amendment. The Board offers no support for this assertion, and in fact it is wrong. In similar cases, this Court has *refused* to hold, absent a clear showing of legislative intent, that Congress rescinded the fundamental purpose of a statute merely by changing a definitional provision.[12]

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[11] 800 F.2d at 1535-36 and n.2, App. 48a-49a; 760 F.2d at 1140-42, App. 23a-28a. *See also* Board Br. 7 n.1, 9-10 n.3; U.S. Trust Br. 13 n.16.

[12] *FDIC v. Philadelphia Gear Corp.*, 106 S. Ct. 1931, 1935-37 (1986) (1960 amendment to definition of "deposit" in Federal Deposit Insurance Act did *not* alter fundamental purpose of the Act, as adopted in 1933, to protect the "assets and 'hard earnings' " of depositors); *Cass v. United States*, 417 U.S. 72 (1974) (1962 amendment to definition of "year" in 10 U.S.C. § 687(a) did *not* rescind fundamental purpose of statute, as enacted in 1956, to require reservists to complete five *full* years of active duty in order to become eligible for readjustment pay). *See also Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) ("repeals by implication are not favored," and therefore the intention to repeal a statute must be "clear and manifest").

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should be issued to review the final judgment of the Eleventh Circuit Court of Appeals in this case.

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